Supreme Court, U.S.
FILED
MAR 2 - 2015
OFFICE OF THE CLERK

No. 14-6368

IN THE

Supreme Court of the United States

MICHAEL B. KINGSLEY,
Petitioner,

v.

STAN HENDRICKSON AND FRITZ DEGNER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

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CERTIORARI GRANTED: JAN. 16, 2015

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN (MADISON)

Docket No. 3:10-cv-00832-bbc

MICHAEL KINGSLEY,

v.

STAN HENDRICKSON, ET AL.,

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
12/28/2010	1	COMPLAINT against Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai, Dennis Pedersen filed by Michael B. Kingsley. (Case randomly assigned to District Judge Barbara B. Crabb.) (Attachments: #1 Cover Letter, # 2 Envelope) (jef) (Entered: 12/28/2010)
12/28/2010	2	Motion for Leave to Proceed in forma pauperis by Plaintiff Michael B. Kingsley. (Attachments: # 1 Envelope) (jef),(ps) (Entered: 12/28/2010)

DATE	NO.	PROCEEDINGS
	* * * *	
01/31/2011	6	ORDER on Leave to Proceed: Plaintiff granted leave to proceed against Defendants Stan Hendrickson, Karl Blanton, Patricia Fish, Lisa Josvai, Fritz Degner, Robert Conroy. Leave to proceed denied and case dismissed against Dennis Pedersen. Materials delivered to USMS for service. Signed by District Judge Barbara B. Crabb on 1/31/2011. (jef),(ps) (Entered: 01/31/2011)
	* * * *	
02/01/2011		Summons Issued as to Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai. Delivered to USMS for service. (jef),(ps) (Entered: 02/01/2011)
02/11/2011	8	Marshal Service Return Executed. Lisa Josvai served on 2/8/2011; Patricia Fish served on 2/8/2011; Robert Conroy served on 2/8/2011; Stan Hendrickson served on 2/8/2011; Fritz Degner served on 2/8/2011; Karl Blanton served on 2/8/2011. (Attachments: # 1 USMS service form as to Patricia Fish,

DATE	NO.	PROCEEDINGS
		# 2 USMS service form as to Robert Conroy, # 3 USMS service form as to Stan Hendrickson, # 4 USMS service form as to Fritz Degner, # 5 USMS service form as to Karl Blanton) (jef),(ps) Modified on 2/15/2011 (elc). (Entered: 02/15/2011)
02/25/2011	9	ANSWER by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai. (Attachments: # 1 Certificate of Service) (Jones, Andrew),(ps) (Entered: 02/25/2011)
	* * * *	
04/21/2011	10	Pretrial Conference Order-Dispositive Motions for Failure to Exhaust Administrative Remedies due 6/3/2011. Dispositive Motions due 10/31/2011. Final Pretrial Submissions/Disclosures and Motions in Limine due 3/9/2012. Responses due 3/23/2012. Final Pretrial Conference set for 4/9/2012 at 08:30 AM. Jury Selection and Trial set for

DATE	NO.	PROCEEDINGS
		4/9/2012 at 09:00 AM. Signed by Magistrate Judge Stephen L. Crocker on 4/20/2011. (jef),(ps) (Entered: 04/21/2011)
	*	* * *
05/17/2011	14	Motion to Appoint Counsel by Plaintiff Michael B. Kingsley. (Attachments: # 1 Cover Letter and Envelope) (elc),(ps) (Entered: 05/17/2011)
05/17/2011	15	Brief in Support of 14 Motion to Appoint Counsel by Plaintiff Michael B. Kingsley (elc),(ps) (Entered: 05/17/2011)
05/17/2011	16	Declaration of Michael B. Kingsley re: 14 Motion to Appoint Counsel (Attachments: # 1 Attorney Rejection Letters) (elc),(ps) (Entered: 05/17/2011)
05/23/2011	17	ORDER denying 14 Motion to Appoint Counsel without prejudice. Signed by Magistrate Judge Stephen L. Crocker on 5/23/11. (elc),(ps) (Entered: 05/23/2011)
	*	* * *
07/14/2011	21	MOTION FOR PARTIAL SUMMARY JUDGMENT by Plaintiff Michael B. Kingsley. (Attachments:

DATE	NO.	PROCEEDINGS
		# 1 Cover Letter,
		# 2 Certificate of Service,
		# 3 Envelope) (jaf),(ps) (Entered: 07/14/2011)
07/14/2011	22	Declaration of Michael B. Kingsley filed by Plaintiff Michael B. Kingsley re: 21 Motion for Partial Summary Judgment (jaf),(ps) (Entered: 07/14/2011)
07/14/2011	23	Proposed Findings of Fact filed by Plaintiff Michael B. Kingsley re: 21 Motion for Partial Summary Judgment filed by Michael B. Kingsley (jaf),(ps) (Entered: 07/14/2011)
07/14/2011	24	Brief in Support of 21 Motion for Partial Summary Judgment by Plaintiff Michael B. Kingsley (jaf),(ps) (Entered: 07/14/2011)
07/14/2011	25	Declaration of Michael B. Kingsley re: Exhibits filed by Plaintiff Michael B. Kingsley re: 21 Motion for Partial Summary Judgment (Attachments:
		# 1 Exhibit 1-Inmate Major Violation Report,
		# 2 Exhibit 2-Major Discipline Appeal,

DATE	NO.	PROCEEDINGS
		# 3 Exhibit 3-Directives/ Procedures/Orders) (jaf),(ps) (Entered: 07/14/2011)
07/14/2011		Set Deadlines as to 21 MOTION FOR PARTIAL SUMMARY JUDGMENT. [Pro Se Summary Judgment Procedure for Cases Assigned to Judge Crabb attached.] Defendants' Brief in Opposition due 8/15/2011. Plaintiff's Brief in Reply due 8/25/2011. (elc),(ps) (Entered: 07/14/2011)
08/15/2011	26	Cross MOTION FOR SUMMARY JUDGMENT by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai. (Posnanski, Timothy),(ps) (Entered: 08/15/2011)
08/15/2011	27	Proposed Findings of Fact filed by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai re: 21 Motion for Partial Summary Judgment filed by Michael B. Kingsley, 26 Motion for Summary Judgment filed by Karl Blanton, Stan Hendrickson, Fritz Degner, Patricia Fish, Lisa Josvai,

DATE	NO.	PROCEEDINGS
		Robert Conroy (Posnanski, Timothy),(ps) (Entered: 08/15/2011)
08/15/2011	28	Brief in Opposition by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai re: 21 MOTION FOR PARTIAL SUMMARY JUDGMENT filed by Michael B. Kingsley *and in Support of 26 Defendants' Cross-Motion for Summary Judgment* (Posnanski, Timothy),(ps) Modified docket relationship on 8/16/2011 (mmo). (Entered: 08/15/2011)
08/15/2011	29	Response to Proposed Findings of Fact filed by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai re: 21 MOTION FOR PARTIAL SUMMARY JUDGMENT *and in Support of 26 Defendants' Cross-Motion for Partial Summary Judgment* (Posnanski, Timothy), (ps) Modified docket relationship on 8/16/2011 (mmo). (Entered: 08/15/2011)
08/15/2011	30	Declaration of Lisa Josvai filed by Defendant Lisa Josvai re: 26

DATE	NO.	PROCEEDINGS
		Motion for Summary Judgment (Attachments: # 1 Exhibit A-Monroe County Sheriff Prisoner Control Record, # 2 Exhibit B-Major Discipline Appeal) (Posnanski, Timothy),(ps) Modified exhibit descriptions on 8/16/2011 (mmo). (Entered: 08/15/2011)
08/15/2011	31	Declaration of Timothy H. Posnanski filed by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai re: 26 Motion for Summary Judgment (Attachments: # 1 Exhibit 1-Excerpts of Kingsley depo., # 2 Exhibit 2-Copies of unpublished sources) (Posnanski, Timothy),(ps) Modified exhibit descriptions on 8/16/2011 (mmo). (Entered: 08/15/2011)
08/15/2011	32	Declaration of Karl Blanton filed by Defendant Karl Blanton re: 26 Motion for Summary Judgment (Attachments: # 1 Exhibit A-Incident report) (Posnanski, Timothy),(ps) Modified exhibit description on

DATE	NO.	PROCEEDINGS
		8/16/2011 (mmo). (Entered: 08/15/2011)
08/15/2011	33	Declaration of Robert Conroy filed by Defendant Robert Conroy re: 26 Motion for Summary Judgment (Attachments: # 1 Exhibit A-Incident report) (Posnanski, Timothy),(ps) Modified exhibit description on 8/16/2011 (mmo). (Entered: 08/15/2011)
08/15/2011	34	Declaration of Nicholas Manka filed by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai re: 26 Motion for Summary Judgment (Attachments: # 1 Exhibit A-Incident report) (Posnanski, Timothy),(ps) Modified exhibit description on 8/16/2011 (mmo). (Entered: 08/15/2011)
08/15/2011	35	Declaration of Patricia Fish filed by Defendant Patricia Fish re: 26 Motion for Summary Judgment (Attachments: # 1 Exhibit A-Monroe Co. Jail Inmate Major Violation Report) (Posnanski, Timothy),(ps) Modified exhibit description on

DATE	NO.	PROCEEDINGS
		8/16/2011 (mmo). (Entered: 08/15/2011)
08/15/2011	36	Declaration of Stan Hendrickson filed by Defendant Stan Hendrickson re: 26 Motion for Summary Judgment (Attachments: # 1 Exhibit A-Incident report) (Posnanski, Timothy),(ps) Modified exhibit description on 8/16/2011 (mmo). (Entered: 08/15/2011)
08/15/2011	37	Declaration of Fritz Degner filed by Defendant Fritz Degner re: 26 Motion for Summary Judgment (Attachments: # 1 Exhibit A-Incident report) (Posnanski, Timothy),(ps) Modified exhibit description on 8/16/2011 (mmo). (Entered: 08/15/2011)
08/15/2011	38	Declaration of Jeffrey Leis filed by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai re: 26 Motion for Summary Judgment (Posnanski, Timothy),(ps) (Entered: 08/15/2011)

* * * *

DATE	NO.	PROCEEDINGS
08/16/2011		Set Deadlines as to 26 Cross MOTION FOR SUMMARY JUDGMENT. [Pro Se Summary Judgment Procedure for Cases Assigned to Judge Crabb attached.] Plaintiff's Brief in Opposition due 9/15/2011. Defendants' Brief in Reply due 9/26/2011. (elc),(ps) (Entered: 08/16/2011)
09/20/2011	40	Brief in Opposition by Plaintiff Michael B. Kingsley re: 26 Motion for Summary Judgment filed defendants. (Attachments: # 1 Certificate of Service, # 2 Cover Letter, # 3 Envelope) (jef),(ps) (Main Document 40 replaced on 9/20/2011) (jef). (Entered: 09/20/2011)
09/20/2011	41	Proposed Findings of Fact filed by Plaintiff Michael B. Kingsley re: 26 Motion for Summary Judgment. (jef),(ps) (Entered: 09/20/2011)
09/20/2011	42	Response to Proposed Findings of Fact filed by Plaintiff Michael B. Kingsley re: 26 Cross MOTION FOR SUMMARY JUDGMENT. (jef),(ps) (Entered: 09/20/2011)

DATE	NO.	PROCEEDINGS
09/20/2011	43	Declaration in opposition filed by Plaintiff Michael B. Kingsley re: 26 Motion for Summary Judgment. (Attachments: # 1 Plaintiff's verified complaint) (jef),(ps) (Entered: 09/20/2011)
09/20/2011	44	Declaration of exhibits filed by Plaintiff Michael B. Kingsley re: 26 Motion for Summary Judgment. (Attachments: # 1 Exhibit A-Wis. Stats. Ch. 350-350.27, # 2 Exhibit B-Prescription, patient instructions, diagnosis, # 3 Exhibit C-Monroe County Jail rules, # 4 Exhibit D-Inmate requests, # 5 Exhibit E-Inmate complaints and response, # 6 Exhibit F-Inmate general request form, # 7 Exhibit G-Monroe County log reports) (jef),(ps) (Entered: 09/20/2011)
09/20/2011	45	Declaration of Michael Kingsley re: 26 Motion for Summary Judgment. (Attachments: # 1 Exhibit A1-Inmate request to speak with an officer, 8/21/11,

DATE	NO.	PROCEEDINGS
		# 2 Exhibit A2-Inmate major violation report, 5/22/10) (jef),(ps) (Entered: 09/21/2011)
09/20/2011	46	Declaration of Michael Kingsley in Support of the Audio and Video. (Attachments: # 1 Exhibit A-Letter from attorney Andrew Jones, 9/2/11) (jef),(ps) (Entered: 09/21/2011)
	*	* * *
09/21/2011		Reset Deadlines as to defendants' 26 Cross MOTION FOR SUMMARY JUDGMENT. Defendants' Brief in Reply due 10/3/2011. (jef),(ps) (Entered: 09/21/2011)
	*	* * *
10/03/2011	50	Brief in Reply by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai, Dennis Pedersen in Support of 26 Motion for Summary Judgment (Posnanski, Timothy),(ps) (Entered: 10/03/2011)
10/03/2011	51	Reply in Support of Proposed Findings of Fact filed by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan

DATE	NO.	PROCEEDINGS
		Hendrickson, Lisa Josvai, Dennis Pedersen re: 26 Cross MOTION FOR SUMMARY JUDGMENT (Posnanski, Timothy),(ps) (Entered: 10/03/2011)
10/03/2011	52	Response to Proposed Findings of Fact filed by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai, Dennis Pedersen re: 26 Cross MOTION FOR SUMMARY JUDGMENT (Posnanski, Timothy),(ps) (Entered: 10/03/2011)
10/03/2011	53	Declaration of Peter F. Sewell filed by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai, Dennis Pedersen re: 26 Motion for Summary Judgment (Sealed Document) (Attachments: # 1 Exhibit A-CD) (Posnanski, Timothy),(ps) Modified exhibit description on 10/4/2011 (mmo). (Entered: 10/03/2011)
10/03/2011	54	Supplemental Declaration of Lisa Josvai filed by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish,

DATE	NO.	PROCEEDINGS
		Stan Hendrickson, Lisa Josvai, Dennis Pedersen re: 26 Motion for Summary Judgment (Sealed Document) (Attachments:
		# 1 Exhibit A-CD (Posnanski, Timothy),(ps) Modified exhibit description on 10/4/2011 (mmo). (Entered: 10/03/2011)
10/03/2011	55	Supplemental Declaration of Stan Hendrickson filed by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Patricia Fish, Stan Hendrickson, Lisa Josvai, Dennis Pedersen re: 26 Motion for Summary Judgment (Posnanski, Timothy),(ps) (Entered: 10/03/2011)
	*	* * *
11/16/2011	69	ORDER granting in part and denying in part defendants' 26 Motion for Summary Judgment; denying plaintiff's 21 Motion for Partial Summary Judgment. Signed by District Judge Barbara B. Crabb on 11/16/11. (elc),(ps) (Entered: 11/16/2011)
	*	* * *
02/14/2012	75	Motion for reconsideration for appointment of counsel by Plaintiff Michael B. Kingsley. (Attachments:

DATE	NO.	PROCEEDINGS
		# 1 Cover Letter, # 2 Envelope) (jef),(ps) (Entered: 02/14/2012)
		* * * *
02/22/2012	77	ORDER granting plaintiff's 75 Motion to Appoint Counsel. Attorneys Edward J. Pardon, Wendy M. Ward and Joel Frederick Graham are appointed to represent plaintiff Michael B. Kingsley in this case. Proceedings in this case are STAYED pending a status conference, at which time a new schedule will be set to resolve this case. The deadlines set in the court's February 17, 2012 trial preparation order are STRICKEN. Signed by Magistrate Judge Stephen L. Crocker on 2/21/2012. (jef),(ps) (Entered: 02/22/2012)
02/22/2012		Set Telephone Pretrial or Status Conference: Telephone Status Conference set for Wednesday, 3/14/2012 at 01:30 PM before Magistrate Judge Stephen L. Crocker. Counsel for Plaintiff responsible for setting up the call to chambers at (608) 264-5153. (jef),(ps) (Entered: 02/22/2012)

DATE	NO.	PROCEEDINGS
03/19/2012	78	Pretrial Conference Order-Plaintiff's motion to clarify if he has an official capacity claim due 5/18/2012. Settlement Letters due 8/31/2012. Rule 26(a) (3) Disclosures and all motions in limine due 9/7/2012. Responses due 9/21/2012. Final Pretrial Conference set for 10/4/2012 at 04:00 PM. Jury Selection and Trial set for 10/9/2012 at 09:00 AM. Signed by Magistrate Judge Stephen L. Crocker on 3/16/2012. (jef),(ps) (Entered: 03/19/2012)
	* * * *	
09/07/2012	84	Proposed Jury Instructions-Liability by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Stan Hendrickson (Jones, Andrew),(ps) (Entered: 09/07/2012)
09/07/2012	85	Proposed Jury Instructions-Damages by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Stan Hendrickson (Jones, Andrew),(ps) (Entered: 09/07/2012)
09/07/2012	86	Proposed Special Verdict-Liability by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Stan Hendrickson

DATE	NO.	PROCEEDINGS
		(Jones, Andrew),(ps) (Entered: 09/07/2012)
09/07/2012	87	Proposed Special Verdict-Damages by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Stan Hendrickson (Jones, Andrew),(ps) (Entered: 09/07/2012)
	*	* * *
09/07/2012	95	Proposed Special Verdict-Liability and Damages by Plaintiff Michael B. Kingsley (Graham, Joel),(ps) (Entered: 09/07/2012)
	*	* * *
09/07/2012	97	Proposed Jury Instructions-Liability and Damages by Plaintiff Michael B. Kingsley (Graham, Joel),(ps) (Entered: 09/07/2012)
	*	* * *
09/21/2012	115	Response to Proposed Liability and Damages Jury Instructions by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Stan Hendrickson (Posnanski, Timothy),(ps) (Entered: 09/21/2012)
	*	* * *

DATE	NO.	PROCEEDINGS
09/21/2012	117	Response to Proposed Liability and Damages Jury Instructions by Plaintiff Michael B. Kingsley (Graham, Joel),(ps) (Entered: 09/21/2012)
09/21/2012	118	Response to Proposed Special Verdict by Plaintiff Michael B. Kingsley (Graham, Joel),(ps) (Entered: 09/21/2012)
	*	* * *
09/28/2012	124	ORDER GRANTING IN PART and DENYING IN PART 89 Defendants' Motions in Limine; GRANTING IN PART and DENYING IN PART 96 Plaintiff's Motions in Limine. Signed by District Judge Barbara B. Crabb on 9/28/12. (elc),(ps) (Entered: 09/28/2012)
	*	* * *
10/02/2012	127	Stipulation to Amend Caption and for the Dismissal of Certain Claims by Defendants Karl Blanton, Robert Conroy, Fritz Degner, Stan Hendrickson, Plaintiff Michael B. Kingsley. (Attachments: # 1 Text of Proposed Order to Amend Caption and for the Dismissal of Certain Claims) (Pardon, Edward),(ps) (Entered: 10/02/2012)

DATE	NO.	PROCEEDINGS
10/02/2012	128	Minute Entry for proceedings held before District Judge Barbara B. Crabb: Final Pretrial Conference held on 10/2/2012. Trial predicted to last 3 days. 14 jurors will be called forward. 8 jurors will be empaneled. [:37] Attention: In the event of a settlement of this matter over the weekend, counsel are advised to contact the Clerk of Court at (608) 287-4875 or the Chief Deputy Clerk at (608) 354-8004. (Court Reporter LS.) (elc),(ps) (Entered: 10/02/2012)
	*	* * *
10/03/2012	130	PRETRIAL CONFERENCE ORDER. Signed by District Judge Barbara B. Crabb on 10/3/2012. (jef),(ps) (Entered: 10/03/2012)
10/04/2012	131	ORDER granting 127 Stipulation to Amend Caption and for the Dismissal of Certain Claims. Signed by District Judge Barbara B. Crabb on 10/2/2012. (elc),(ps) (Entered: 10/04/2012)
	*	* * *
10/05/2012		Set/Reset Trial Deadlines/ Hearings: Jury Selection set for 10/9/2012 at 2:00 PM in

DATE	NO.	PROCEEDINGS
		courtroom 360. Jury Trial set for 10/15/2012 at 9:00 AM in courtroom 260. (lak),(ps) (Entered: 10/05/2012)
	*	* * *
10/11/2012	141	Joint Stipulation for Authentication and Admissibility of Evidence by Defendants Fritz Degner, Stan Hendrickson, Plaintiff Michael B. Kingsley. (Graham, Joel),(ps) (Entered: 10/11/2012)
10/15/2012		Set/Reset Trial Date: 2nd Day Jury Trial set for 10/16/2012 at 9:00 AM. (lak), (ps) (Entered: 10/15/2012)
10/15/2012	142	Minute Entry for proceedings held before District Judge Barbara B. Crabb: 1st Day Jury Trial held on 10/15/2012. Trial continues. [6:06] (Court Reporter CS/LS.) (elc),(ps) (Entered: 10/15/2012)
10/16/2012		Set/Reset Trial Date: 3rd Day Jury Trial set for 10/17/2012 at 9:00 AM. (lak), (ps) (Entered: 10/16/2012)
10/16/2012	143	Minute Entry for proceedings held before District Judge Barbara B. Crabb: 2nd Day Jury Trial held on 10/16/2012. Trial continues. [3:39] (Court

DATE	NO.	PROCEEDINGS
		Reporter CS/LS.) (elc),(ps) (Entered: 10/16/2012)
10/17/2012	144	Minute Entry for proceedings held before District Judge Barbara B. Crabb: 3rd Day Jury Trial held on 10/17/2012. Verdict returned in favor of Fritz Degner and Stan Hendrickson. [3:54] (Court Reporter LS.) (elc),(ps) (Entered: 10/18/2012)
10/18/2012	145	Introductory Jury Instructions. (elc),(ps) (Entered: 10/18/2012)
10/18/2012	146	Post-Trial Jury Instructions. (elc),(ps) (Entered: 10/18/2012)
10/18/2012	147	Jury Verdict Verdict returned in favor of Defendants Fritz Degner and Stan Hendrickson. (elc),(ps) (Entered: 10/18/2012)
10/18/2012	148	Plaintiff Michael Kingsley's exhibit list and received exhibits submitted to jury. (Attachments: # 1 Exhibit 5, # 2 Exhibit 9, # 3 Exhibit 10, # 4 Exhibit 12, # 5 Exhibit 37, # 6 Exhibit 50,

DATE	NO.	PROCEEDINGS
		# 7 Exhibit 60,
		# 8 Exhibit 100-Pages 1-100,
		# 9 Exhibit 100-Pages 101-204,
		# 10 Exhibit 108 (unable to be scanned in color)). Note: Exhibits 13 and 14 are videos and not able to be scanned in to ECF. (elc),(ps) (Entered: 10/18/2012)
10/18/2012	149	Defendants Fritz Degner and Stan Hendrickson's exhibit list and received exhibits submitted to jury. (Attachments:
		# 1 Exhibit 509 A,
		# 2 Exhibit 509 B,
		# 3 Exhibit 510 A,
		# 4 Exhibit 510 B,
		# 5 Exhibit 512,
		# 6 Exhibit 513,
		# 7 Exhibit 517,
		# 8 Exhibit 518) Note: Exhibits 520 is a video and not able to be scanned in to ECF.(elc),(ps) (Entered: 10/18/2012)
10/23/2012	150	JUDGMENT entered in favor of defendants dismissing this case. (BBC/PAO). (jef),(ps) (Entered: 10/23/2012)

DATE	NO.	PROCEEDINGS
10/24/2012	151	ORDER accepting 141 Joint Stipulation for Authentication and Admissibility of Evidence. Signed by District Judge Barbara B. Crabb on 10/11/2012. (jef), (ps) (Entered: 10/24/2012)
	*	* * *
11/05/2012	154	Transcript of Second Day of Jury Trial, Afternoon Session, held October 15, 2012 before Judge Barbara B. Crabb. Court Reporter: LS. Please review the court policy regarding electronic transcripts: see Electronic Transcript Instructions and Notice of Intent to Request Redaction. (jef),(ps) (Entered: 11/05/2012)
11/05/2012	155	Transcript of Third Day of Jury Trial, Afternoon Session, held October 16, 2012 before Judge Barbara B. Crabb. Court Reporter: LS. Please review the court policy regarding electronic transcripts: see Electronic Transcript Instructions and Notice of Intent to Request Redaction. (jef),(ps) (Entered: 11/05/2012)
11/05/2012	156	Transcript of Fourth Day of Jury Trial, Afternoon Session, held October 17, 2012 before Judge

DATE	NO.	PROCEEDINGS
		Barbara B. Crabb. Court Reporter: LS. Please review the court policy regarding electronic transcripts: see Electronic Transcript Instructions and Notice of Intent to Request Redaction. (jef),(ps) (Entered: 11/05/2012)
11/05/2012	157	Transcript of Second Day of Jury Trial, Morning Session, held October 15, 2012 before Judge Barbara B. Crabb. Court Reporter: CS. Please review the court policy regarding electronic transcripts: see Electronic Transcript Instructions and Notice of Intent to Request Redaction. (elc),(ps) (Entered: 11/05/2012)
11/05/2012	158	Transcript of Third Day of Jury Trial, Morning Session, held October 16, 2012 before Judge Barbara B. Crabb. Court Reporter: CS. Please review the court policy regarding electronic transcripts: see Electronic Transcript Instructions and Notice of Intent to Request Redaction. (elc),(ps) (Entered: 11/05/2012)

* * * *

DATE	NO.	PROCEEDINGS
11/19/2012	162	NOTICE OF APPEAL by Plaintiff Michael B. Kingsley as to 150 Judgment. In forma pauperis requested. Docketing Statement filed. (Attachments: # 1 Docketing Statement) (Ward, Wendy),(ps) Modified docket text on 11/20/2012 (mmo). (Entered: 11/19/2012)
11/19/2012	163	Transcript Request Form by Plaintiff Michael B. Kingsley re 162 Notice of Appeal (Ward, Wendy),(ps) Modified on 11/20/2012; forwarded signed copy to USCA (mmo). (Entered: 11/19/2012)
11/19/2012	164	Transmission of Notice of Appeal, Docketing Statement, Appeal Information Sheet, Docket Sheet and Judgment to Seventh Circuit Court of Appeals re 162 Notice of Appeal (Attachments: # 1 Info sheet, # 2 Docketing statement, # 3 Judgment, # 4 Docket sheet) (mmo),(ps) (Entered: 11/19/2012)
11/19/2012		USCA Case Number 12-3639 for 162 Notice of Appeal filed by

DATE	NO.	PROCEEDINGS
		Michael B. Kingsley. (elc),(ps) (Entered: 11/19/2012)
	*	* * *
11/28/2012		Appeal Remark re 162 Notice of Appeal: Three "CD" Exhibits, #13 (to 54), #14 (to 53) and #520 (see 149)were returned to court to be included in the appeal record to the Seventh Circuit. Stored on shelf #13. (mmo),(ps) (Entered: 11/28/2012)
11/28/2012	166	Motion for Leave to Proceed in forma pauperis on Appeal by Plaintiff Michael B. Kingsley. (Attachments:
		# 1 Exhibit-Affidavit in support of IFP Motion,(refiled separately as 167)
		# 2 Exhibit-Trust Account Statement) (Ward, Wendy),(ps) Modified on 11/29/2012; sealed TFAS. (mmo). (Entered: 11/28/2012)
11/29/2012	167	Affidavit of Michael B. Kingsley filed by Plaintiff Michael B. Kingsley re: 166 Motion for Leave to Proceed In Forma Pauperis on Appeal, (Attachments:
		# 1 Exhibit-Trust Account Statement) (Ward, Wendy),(ps)

DATE	NO.	PROCEEDINGS
		(Additional attachment(s) added on 11/29/2012: # 2 IPP Calculation) (elc). Modified on 11/30/2012; sealed TFAS. (mmo). (Entered: 11/29/2012)
11/29/2012	168	ORDER granting plaintiff's 166 Motion for Leave to Appeal in forma pauperis. Plaintiff may have until December 21, 2012, in which to submit a check or money order made payable to the clerk of court in the amountof $5.83. Signed by District Judge Barbara B. Crabb on 11/29/2012. (jef),(ps) (Entered: 11/29/2012)
	*	* * *
12/06/2012	170	Motion for Reconsideration re 168 Order assessing initial partial appeal payment by Plaintiff Michael B. Kingsley. (Attachments: # 1 Envelope) (elc),(ps) (Entered: 12/06/2012)
12/06/2012	171	Declaration of Michael B. Kingsley re: 170 Motion for Reconsideration of order assessing initial partial appeal payment. (Attachments: # 1 November Trust Fund Account Statement) (elc),(ps) (Entered: 12/06/2012)

DATE	NO.	PROCEEDINGS
12/12/2012	172	ORDER denying plaintiff's 170 motion for reconsideration of the order assessing a $5.83 initial partial payment of the $455 appeal filing fee. Plaintiff may have an enlargement of time to January 7, 2013, in which to submit a check or money order made payable to the clerk of court in the amount of $5.83. Signed by District Judge Barbara B. Crabb on 12/11/2012. (jef),(ps) (Entered: 12/12/2012)
01/04/2013	173	Motion for Extension of Time *to Pay Initial Appeal Fee* by Plaintiff Michael B. Kingsley. Motions referred to Magistrate Judge Stephen L. Crocker. (Attachments: # 1 Undated Declaration) (Ward, Wendy),(ps) Modified on 1/4/2013; requested attorney refile Declaration as separate document. (mmo). (Entered: 01/04/2013)
01/04/2013	174	** TEXT ONLY ORDER ** Order GRANTING 173 Motion for Extension of Time. Plaintiff's initial partial appeal payment of $5.83 is due by January 21, 2013. Signed by Magistrate Judge Stephen L. Crocker on

DATE	NO.	PROCEEDINGS
		1/4/2013. (elc),(ps) (Entered: 01/04/2013)
01/04/2013	175	Declaration of Michael B. Kingsley filed by Plaintiff Michael B. Kingsley *(undated)* re: 173 MOTION for Extension of Time, (Ward, Wendy), (ps) (Entered: 01/04/2013)
01/11/2013		Appeal Initial Partial Filing fee received: $5.83, receipt number 16271. (jef), (ps) (Entered: 01/11/2013)
01/16/2013	176	Amended Declaration of Michael B. Kingsley filed by Plaintiff Michael B. Kingsley re: 173 MOTION for Extension of Time, (Attachments: # 1 Cover Letter) (Graham, Joel),(ps) (Entered: 01/16/2013)
	*	* * *
03/29/2013	178	Certified and Transmitted Record on Appeal to US Court of Appeals re 162 Notice of Appeal. (Attachments: # 1 Certification) (elc),(ps) (Entered: 03/29/2013)
04/16/2013	179	Notice of Withdrawal of Counsel by Joel Frederick Graham re: Plaintiff Michael B. Kingsley (Graham, Joel),(ps) (Entered: 04/16/2013)

DATE	NO.	PROCEEDINGS
	*	* * *
04/28/2014	181	JUDGMENT from USCA affirming district court as to 162 Notice of Appeal filed by Michael B. Kingsley. Record not returned. (Attachments: # 1 USCA Order denying petition for rehearing, # 2 Mandate) (elc),(ps) (Entered: 04/28/2014)
05/02/2014		Appeal Record Returned. (Exhibits 13, 13, 14 on 3 Original CDs/Exhibits A to Dkts. #53, 54). (jef),(ps) (Entered: 05/02/2014)

GENERAL DOCKET
SEVENTH CIRCUIT COURT OF APPEALS

Court of Appeals Docket No. 12-3639

MICHAEL KINGSLEY,

v.

STAN HENDRICKSON, ET AL.,

Docketed: 11/19/2012
Termed: 03/03/2014

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
11/19/2012 26 pg, 959.71 KB	1	State prisoner's civil rights case docketed. IT IS ORDERED that this appeal is subject to the Prison Litigation Reform Act. Proceedings are SUSPENDED pending notification by the district court that any necessary fee has been assessed, and if assessed, paid. ~~Private civil case docketed~~. IFP pending in the District Court. Docketing statement filed. Transcript information sheet due by 12/03/2012. [1] [6444115] [12-3639] [Editted 12/7/12 by JAD to reflect that this is a prisoner civil rights case] (SM)

* * * *

DATE	NO.	PROCEEDINGS
11/30/2012 3 pg, 49.25 KB	4	Filed District Court order GRANTING Appellant Michael B. Kingsley leave to proceed on appeal in forma pauperis and assessed a $5.83 partial filing fee. Date IFP granted: 11/29/2012. Partial fee due 12/21/2012. [4] [6446549] [12-3639] (DS)
*	*	* *
12/21/2012 3 pg, 52.52 KB	8	Filed district court order dated 12/11/2012: The plaintiff may have until January 7, 2012, in which to submit a check or money order made payable to the clerk of court in the amount of $5.83. [8] [6451882] PLRA initial partial filing fee due by 01/07/2013. [12-3639] (JK)
01/10/2013 1 pg, 22.03 KB	9	Filed district court order dated 01/04/2013: Plaintiff's initial partial appeal payment of $5.83 is due by January 21, 2013. [9] [6455633] PLRA initial partial filing fee due by 01/22/2013. [12-3639] (JK)
01/11/2013 1 pg, 37.44 KB	10	***PRISON LITIGATION REFORM ACT PARTIAL FILING FEE. Received: $5.83 from Appellant Michael B. Kingsley on 01/11/2013. [10] [6456108] [12-3639] (EF)

DATE	NO.	PROCEEDINGS
01/14/2013 2 pg, 100.8 KB	11	ORDER: The District Court GRANTED the appellant leave to proceed on appeal in forma pauperis and has now received the initial partial filing fee. Briefing will proceed as follows: Appellant's brief due on or before 02/13/2013 for Michael B. Kingsley. Appellee's brief due on or before 03/15/2013 for Fritz Degner and Stan Hendrickson. Appellant's reply brief, if any, is due on or before 03/29/2013 for Appellant Michael B. Kingsley. [11] [6456525] [12-3639] (EF)
		* * * *
02/13/2013 63 pg, 1.13 MB	15	Appellant's brief filed by Appellant Michael B. Kingsley. Paper copies due on 02/21/2013 Electronically Transmitted. [15] [6464262] [12-3639] (RS)
02/13/2013 113 pg, 2.47 MB	16	Filed Appendix by Appellant Michael B. Kingsley. [16] [6464264] Paper copies due on 02/21/2013 [12-3639] (RS)
		* * * *
03/15/2013 48 pg, 144.6 KB	17	Submitted appellee brief by Andrew A. Jones for Appellees Fritz Degner and Stan Hendrickson. [17] [6471576] [12-3639] (Jones, Andrew)
03/15/2013	18	Submitted Supplemental

DATE	NO.	PROCEEDINGS
5 pg, 122.76 KB		Appendix by Andrew A. Jones for Appellees Fritz Degner and Stan Hendrickson. [18] [6471577] [12-3639] (Jones, Andrew)
	* * * *	
03/26/2013 1 pg, 86.3 KB	20	Notice to the District Court to transmit the record on appeal. [20] [6473907] [12-3639] (RS)
03/26/2013 4 pg, 138.34 KB	21	Argument set for Tuesday, April 23, 2013, at 10:30 a.m. in the Main Courtroom, Room 2721. Each side limited to 10 minutes. [21] [6473929] [12-3639] (RS)
	* * * *	
03/29/2013 20 pg, 149.89 KB	23	Appellant's reply brief filed by Appellant Michael B. Kingsley. Paper copies due on 04/05/2013 Electronically Transmitted. [23] [6475247] [12-3639] (SP)
	* * * *	
04/03/2013 2327 pg, 103.9 MB	25	Original record on appeal filed electronically. Contents of record: 13 vols. of pleadings. [25] [6476071] [12-3639] (AB)
04/03/2013 44 pg, 871.62 KB	26	Original record on appeal filed electronically. Contents of record: 7 sealed documents. [26] [6476072] [12-3639] (AB)
04/03/2013	27	Original paper record on appeal filed. Contents of record: 1 cd of

DATE	NO.	PROCEEDINGS
		exhibits; 1 sealed envelope. [27] [6476075] [12-3639] (AB)
04/03/2013	28	Filed electronic transcript of proceedings held on 10/15/12, 10/16/12 & 10/17/12. [28] [6476079] THIS TRANSCRIPT IS FOR INTERNAL COURT USE ONLY. Remote electronic access to the transcript is ONLY available through the District Court's PACER system. [12-3639] (AB)
	*	* * *
04/23/2013	33	Case heard and taken under advisement by panel: Kenneth F. Ripple, Circuit Judge; David F. Hamilton, Circuit Judge and J. P. Stadtmueller, District Court Judge. [33] [6480886] [12-3639] (GW)
04/23/2013	34	Case argued by Ms. Wendy M. Ward for Appellant Michael B. Kingsley and Timothy H. Posnanski for Appellees Fritz Degner and Stan Hendrickson. [34] [6480889] [12-3639] (GW)
03/03/2014 48 pg, 1.05 MB	35	Filed opinion of the court by Judge Ripple. AFFIRMED. Kenneth F. Ripple, Circuit Judge; David F. Hamilton, Circuit Judge, dissenting, and J. P. Stadtmueller, District Court Judge. [35] [6556344] [12-3639] (CD)

DATE	NO.	PROCEEDINGS
03/03/2014 1 pg, 602.22 KB	36	ORDER: Final judgment filed per opinion. With costs: no. [36] [6556348] [12-3639] (CD)
	*	* * *
03/17/2014 21 pg, 235.05 KB	39	Filed Petition for Rehearing and Petition for Rehearing Enbanc by Appellant Michael B. Kingsley. Paper copies due on 03/20/2014 [39] [6560137] [12-3639] (LJ)
03/20/2014 1 pg, 862.6 KB	40	Sent clerk's copy of request to Appellees Fritz Degner and Stan Hendrickson requesting 30 copies of their answer to the Petition for Rehearing and Petition for Rehearing Enbanc filed by Appellant Michael B. Kingsley on 03/17/2014. Answer to Petition for Rehearing due for Appellees Fritz Degner and Stan Hendrickson by 04/03/2014. [6561168] [12-3639] (AD)
03/26/2014	41	Supplemental paper record on appeal filed. Contents of record: 1 vol. exhibits; 1 sealed envelopes. [41] [6562553] [12-3639] (LJ)
	*	* * *
04/03/2014 22 pg, 95.05 KB	44	Filed Answer to Petition for Rehearing and Petition for Rehearing Enbanc by Appellees Fritz Degner and Stan Hendrickson. [44] [6564698]

DATE	NO.	PROCEEDINGS
		Paper copies due on 04/07/2014 [12-3639] (GW)
04/18/2014 2 pg, 1.24 MB	45	ORDER: Upon consideration of Plaintiff-Appellant's petition for rehearing with suggestion of rehearing en banc, filed on March 17, 2014, no judge in active service has requested a vote thereon .A majority of the judges on the original panel have voted to deny the petition. Judge Hamilton voted to grant panel rehearing. The petition for rehearing with suggestion of rehearing en banc is hereby DENIED. *Circuit Judge Flaum took no part in the consideration or the decision of this case. [45] [6569223] [12-3639] (AD)
04/28/2014 2 pg, 75.58 KB	46	Mandate issued. Entire record returned. [46] [6571302] [12-3639] (ACB)
	*	* * *
07/02/2014 2 pg, 48.54 KB	47	Notice from the Supreme Court that a motion for extension of time to file a Petition for Writ of Certiorari has been GRANTED, extending such time to 08/18/2014. [47] [6588429] [12-3639] (FP)
09/24/2014 1 pg, 55.37 KB	48	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. 14-6368 [48] [6607901] [12-3639] (DAM)

DATE	NO.	PROCEEDINGS
01/20/2015 1 pg, 80.96 KB	49	Filed order from the Supreme Court. The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are GRANTED. 14-6368. [49] [6635453] [12-3639] (MM)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed: 11/16/11]

10-cv-832-bbc

MICHAEL B. KINGSLEY,

Plaintiff,

v.

LISA JOSVAI, PATRICIA FISH, ROBERT CONROY, STAN HENDRICKSON, FRITZ DEGNER AND KARL BLANTON,

Defendants.

OPINION and ORDER

In this civil action, plaintiff Michael B. Kingsley is proceeding pro se on claims that defendants Robert Conroy, Stan Hendrickson, Fritz Degner and Karl Blanton used excessive force on him while he was a pretrial detainee in violation of his rights under the Fourteenth Amendment and state law. Additionally, he is proceeding on claims that defendants Patricia Fish and Lisa Josvai denied him his right to procedural due process.

Now before the court are the parties' cross motions for summary judgment. Plaintiff moves for summary judgment on only his due process claim. Dkt. #21. Defendants move for summary judgment on plaintiff's excessive force and due process claims. Dkt. #26.

(Defendants did not move for summary judgment on plaintiff's state law assault and battery claim. Their first and only mention of this claim is a footnote in their reply brief, in which they contend that "[f]or the same reasons that [plaintiff's] excessive force claim should be denied, [plaintiff's] state law assault and battery claim should likewise be denied." Dfts.' Reply Br., dkt. #50, at 12, n.4. Even if defendants had made this conclusory argument in their opening brief, I would not have been persuaded by it. The legal standard for plaintiff's constitutional excessive force claim is not the same as for his assault and battery claim.)

After reviewing the parties' arguments and the evidence in the record, I conclude that defendants' motion must be granted in part and denied in part. Defendants' motion must be denied with respect to plaintiff's claims that defendants Conroy, Hendrickson, Degner and Blanton used excessive force against him after they carried him to a receiving cell. There are too many material facts in dispute related to the reasonableness and necessity of the force used by defendants while they were in the receiving cell. However, I will grant defendants' motion as it relates to plaintiff's claim that defendants Conroy, Hendrickson, Degner and Blanton used excessive force against him when they removed him from his cell and carried him to the receiving cell. Plaintiff has adduced no specific evidence that defendants used excessive force against him during the transport.

Also, I will grant defendants' motion as it relates to plaintiff's claim that defendants Fish and Josvai violated his Fourteenth Amendment rights by failing to provide him procedural due process. The fact that plaintiff was held in a receiving cell for two days

without a hearing was not a sufficient deprivation of his liberty to require that defendants provide him a due process hearing at which he would have an opportunity to present witnesses to an impartial decision maker.

In finding which of the proposed material facts are in genuine dispute, I have taken into account the facts proposed by the parties, their responses and supporting affidavits and the videos of the incident filed by defendants.

UNDISPUTED FACTS

At all times relevant to this action, plaintiff Michael Kingsley was a pretrial detainee at the Monroe County jail. Defendants Lisa Josvai, Patricia Fish, Robert Conroy, Stan Hendrickson, Karl Blanton and Fritz Degner are corrections officers at the jail.

Plaintiff was booked into the Monroe County jail on April 21, 2010 and was transferred to the south block of the jail on May 1, 2010. On May 20, 2010, Deputy Nicholas Manka was performing a mandatory cell check and saw that the light fixture above plaintiff's bunk had been covered with a sheet of yellow legal paper. Manka told plaintiff to remove the paper covering the light. Plaintiff refused to remove the paper, stating that he did not put it there. (According to plaintiff, inmates often put paper over their lights because the lights are extremely bright. Plaintiff says the paper had been on the light in his cell since he was placed there.) Manka continued with his cell check, believing that plaintiff would remove the paper covering the light later.

After the jail was locked down for the evening, Manka did another cell check at approximately 10:45 p.m. During this cell check, Manka saw that plaintiff

had not removed the paper from the light fixture above his bunk. Manka asked plaintiff to remove the paper. (Defendants say that plaintiff responded by saying "better call in the CERT (Correctional Emergency Response Team) team." Plaintiff denies saying this.) Manka warned plaintiff that failure to comply with jail rules would result in disciplinary action. Later that night, Manka issued plaintiff an inmate minor violation report.

Deputy Manka told defendant Sergeant Hendrickson that he had issued a violation to plaintiff for his refusal to follow orders and explained what had happened. Hendrickson signed the inmate minor violation report and told defendant Blanton that plaintiff would be required to remove the paper from the light when the cells were open the next morning.

The next morning, May 21, 2010, defendant Blanton went to plaintiff's cell at approximately 5:25 a.m. Blanton told plaintiff to remove the paper covering the light. Plaintiff did not comply and did not respond to Blanton. At approximately 5:48 a.m., defendant Hendrickson performed "medication pass" (presumably this refers to the distribution of medication to inmates for whom it has been prescribed) and took plaintiff his medication. Hendrickson asked plaintiff to remove the paper attached to the light. Initially, plaintiff did not respond. After a few requests, plaintiff told Hendrickson that he would not remove the paper because he did not put it there. Hendrickson told plaintiff several times that he still needed to take it down. Plaintiff did not respond

At approximately 6:13 a.m., defendant Henrickson called jail administrator defendant Robert Conroy to tell him about the situation with plaintiff. Conroy

arrived at the jail at approximately 6:30 a.m. Henderson told Conroy that plaintiff would not respond to orders and Conroy said that he would talk to plaintiff. At approximately 6:33 a.m., Conroy went to plaintiff's cell and asked him to remove the paper from the light fixture. (Defendants say that Conroy told plaintiff the paper was a fire hazard. Plaintiff denies this.) Conroy asked plaintiff several times, but plaintiff refused to take the paper down. Conroy told plaintiff he would remove the paper from the light fixture, but plaintiff would have to be moved to receiving so that a management team could enter plaintiff's cell. Conroy also told plaintiff that he would face disciplinary action because he was failing to follow staff orders.

At approximately 6:38 a.m., defendants Hendrickson, Blanton, Degner, Conroy and Sergeant Shisler went to plaintiff's cell to take him to receiving so that the paper could be removed from the light fixture. Hendrickson ordered plaintiff to stand up and back up to the cell door. Plaintiff asked, "What for? I didn't do anything wrong." Defendant Degner told plaintiff that if he did not comply he would be tasered. Hendrickson ordered plaintiff again to stand up. Plaintiff continued to lie face down on his bunk, but put his hands behind his back. Hendrickson and Blanton entered the cell and attempted to handcuff plaintiff. (Defendants say that plaintiff began tensing and tightening his arms and holding them apart, making it difficult to handcuff him. Plaintiff denies that he was resisting in any way. Defendants did not submit a video that captured the events in plaintiff's cell.) The officers eventually handcuffed plaintiff by applying their body weight to plaintiff to secure him while they handcuffed him. Defendants Blanton and Hendrickson asked plaintiff to stand, but plaintiff refused. Defendants pulled

plaintiff to his feet, and plaintiff fell to his knees, stating that his foot hurt and he could not walk. (Plaintiff says that when defendants pulled him from the bunk, his feet hit the bed frame, caused him serious pain and making him incapable of standing or walking.) Plaintiff would not stand up or walk. Defendants asked plaintiff what was wrong with his foot but he did not respond. The video of this incident shows two officers (defendants Blanton and Hendrickson) carrying plaintiff out of his cell and out of the south cell block by holding him under his arms.

After plaintiff was taken out of the south cell block, he was placed face down on the floor in the hallway. Defendants asked plaintiff what was wrong with his foot, but he did not answer. Deputy Shisler and defendants Conroy, Blanton and Hendrickson carried plaintiff from the hallway into a receiving cell. Plaintiff was placed face down on the receiving cell bunk. Hendrickson and Blanton then attempted to remove his handcuffs.

The parties dispute what happened next and, although defendants submitted a security video from the receiving cell, the view of plaintiff is obstructed by the officers in the cell. Defendants say that plaintiff became physically resistive, pulling the handcuffs apart and trying to get up. The video shows defendant Hendrickson and the officers telling plaintiff repeatedly to relax and stop resisting so that the handcuffs could be removed, but it is not clear from the video whether plaintiff was resisting or struggling. Plaintiff does not appear to be moving his body around aggressively or very much at all, and plaintiff denies being physically resistive or struggling against the handcuffs. However, it is impossible to tell from the

video whether plaintiff was "tensing" his arms as defendants aver.

The video shows defendant Hendrickson putting his knee on plaintiff's back and plaintiff telling Hendrickson to "get the fuck off." (Plaintiff says that at this point, defendants slammed his head down into the concrete cell bed, causing plaintiff serious pain. Defendants deny this. It is not clear from the video whether this happened.)

The verbal exchanges between the parties are not clear on the video. Defendants say that defendant Degner, who was standing to the side with the taser, warned plaintiff that if he did not comply, he would be tasered. Defendant Hendrickson told Degner to apply a "contact stun" to plaintiff. Plaintiff says that Hendrickson told Degner to "tase his ass." Degner applied a contact stun for five seconds on plaintiff's back. (Plaintiff says that the taser caused him "excruciating pain.") Defendant Conroy, who had been waiting in the hall, ordered everyone to clear the cell.

Approximately 15 minutes later, defendant Conroy decided to try again to remove plaintiff's handcuffs. Deputy Tom Wildes, Deputy Bedenbaugh and defendants Blanton and Conroy entered the receiving cell and were able to remove the handcuffs. Following the incident, plaintiff was placed on medical watch. At 7:05 a.m., defendant Blanton asked a jail nurse to examine plaintiff. The nurse came to the receiving cell to check plaintiff for injuries. Plaintiff refused to see her and did not seek any medical attention for any injuries allegedly sustained during his removal from his cell.

After the incidents on May 21, 2010, defendant Patricia Fish reviewed the incident reports prepared

by Deputy Manka and defendants Conroy, Hendrickson, Degner and Blanton. Fish determined that plaintiff had violated four separate Monroe County jail rules: (1) failing to follow lawful orders; (2) resisting jail officers; (3) disorderly conduct; and (4) causing jail disruption. She prepared an inmate major violation report and concluded that plaintiff should receive 10 days in a receiving cell as punishment for his violations of the jail rules.

On May 22, defendant Fish went to plaintiff's cell in receiving, gave him the inmate major violation report and told him that she had imposed 10 days in receiving as sanctions for his violations of jail rules. Fish told plaintiff that he had a right to a hearing regarding his violation of jail rules and that she would conduct the hearing on the disciplinary sanctions she had decided to impose on plaintiff. She asked plaintiff whether he wanted a hearing or whether he would waive his right to a hearing. Plaintiff said that he did not understand his hearing rights and asked "What's the point of having a hearing when it seems to me, though, you have your mind made up without the hearing?" Plaintiff handed the inmate major violation report back to Fish and stated "I didn't understand my hearing rights . . . it seems you had your mind made up, if I had a hearing or if I didn't have a hearing, I would get the 10 days regardless." Plaintiff refused to sign the inmate major violation report and Fish left.

A few minutes later, plaintiff saw defendant Fish in the hallway and asked if he could speak to her. He told her that he wanted a disciplinary hearing. Fish told plaintiff that he had waived his right to a disciplinary hearing when he refused to sign the inmate major violation report. Plaintiff told Fish that he wished to appeal her decision.

On May 23, defendant chief deputy Josvai considered plaintiff's appeal. She reviewed the incident reports and questioned plaintiff. She told plaintiff that she would increase the sanctions imposed on him if she could. Ultimately, she determined that the 10-day sanction was appropriate.

On May 24, defendant Conroy reviewed defendants Fish's and Josvai's decisions and decided that plaintiff had not waived his right to a disciplinary hearing. Conroy overturned the 10-day sanctions and ordered that plaintiff be returned to a regular cell. Plaintiff was returned to a regular cell that morning and did not receive any further penalties or discipline related to the May 21 incident.

OPINION

A. Excessive Force

Plaintiff contends that defendants Conroy, Hendrickson, Degner and Blanton used excessive force to pull him off his bunk and drag him through the hall and that he suffered an injury to his foot and wrists as a result. Additionally, plaintiff contends that defendants used excessive force against him by slamming his head onto the concrete cell bed and tasing him when he was handcuffed in the receiving cell. Defendants contend that their actions did not constitute excessive force and even if they did, they are entitled to qualified immunity on plaintiff's excessive force claim.

Because plaintiff was a pretrial detainee at the time of the incident, his claim of excessive force falls under the due process clause of the Fourteenth Amendment. *Forrest v. Prine*, 620 F.3d 739, 743-44 (7th Cir. 2010); *Lewis v. Downey*, 581 F.3d 467, 473 (7th Cir. 2009). The court of appeals has explained

that "[t]he Fourteenth Amendment right to due process provides at least as much, and probably more, protection against punishment as does the Eighth Amendment's ban on cruel and unusual punishment." *Forrest*, 620 F.3d at 744. However, "the exact contours of any additional safeguards [guaranteed by the Fourteenth Amendment] remain undefined." *Lewis*, 581 F.3d at 474. Neither plaintiff nor defendants have identified any protections guaranteed by the Fourteenth Amendment that would have provided plaintiff more protection than he would received under traditional Eighth Amendment standards. Thus, I will use the Eighth Amendment standards for excessive force cases to analyze plaintiff's Fourteenth Amendment claim. *Id.* at 475 (applying Eighth Amendment excessive force standard to pretrial detainee's excessive force claim); *Forrest*, 620 F.3d at 744 (same).

To determine whether a prison official's use of force on a prisoner was "excessive" in violation of the Eight Amendment, a court must determine "whether [the] force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm." *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992) (quoting *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)). The factors relevant to making this determination include:

- the need for the application of force;
- the relationship between the need and the amount of force that was used;
- the extent of injury inflicted;
- the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them; and

- any efforts made to temper the severity of a forceful response.

Whitley, 475 U.S. at 321.

Plaintiff has adduced no evidence that defendants used excessive force against him when they entered his regular cell, handcuffed him, pulled him off the bunk and carried him to the receiving cell. Plaintiff says that defendants pulled him off the bed in "an excessive way," Plt.'s Dep., dkt. #31-1, at 33, but that is too conclusory a statement to create a genuine issue of material fact. He provides no details about how defendants' actions were "excessive." Moreover, it is undisputed that plaintiff did not get off the bunk or stand up when ordered to do so, thus requiring defendants to pull him up from the bunk. Although plaintiff says that his feet hit the bedframe when defendants pulled him up, he has adduced no evidence suggesting that defendants intentionally caused his feet to hit the bedframe or intended to harm him in anyway. Additionally, defendants asked plaintiff repeatedly what was wrong with his foot and whether he could walk, but plaintiff responded only by saying that his foot hurt and refusing to stand up. Thus, defendants carried him to the receiving cell. No reasonable jury could infer from these allegations that defendants used force against plaintiff "maliciously and sadistically for the very purpose of causing harm," rather than "in a good faith effort to maintain or restore discipline."

However, there is a genuine dispute of material fact regarding whether defendants used excessive force against him once he was in the receiving cell. In particular, there is a dispute about whether defendants slammed plaintiff's head into the concrete bed and used a taser against him solely for the purpose

of causing him harm. Plaintiff says that defendants slammed his head into the concrete cell bed and used a taser against him even though he was not resisting or posing any risk of harm to jail staff or anyone else. He says that to the extent defendants were having difficulty removing his handcuffs, it was solely because they had put the handcuffs on too tightly and because they were kneeling on his back and causing his body to tense. Although defendants deny slamming plaintiff's head and say that plaintiff was resisting their attempts to remove his handcuffs, this is a factual dispute that must be resolved by a jury. The video of the incident is the only objective evidence in the record and it does not establish whether plaintiff was resisting, whether defendants slammed plaintiff's head into the concrete slab or whether defendants' use of the taser was reasonable. The video shows only that plaintiff was handcuffed, lying on his stomach and surrounded by correctional officers when the alleged excessive force occurred. If a jury were to believe plaintiff's version of events, the jury could conclude that because plaintiff was not resisting and posed no safety threat at the time defendants slammed his head and used the taser against him, defendants' use of force was disproportionate to the situation. In addition, a jury could conclude that defendants made no efforts to temper the severity of the force and that defendants intended to harm plaintiff.

Defendants cite several cases that they contend support their use of force, but the cases do not change my conclusion that a genuine dispute of fact exists that must be resolved by a jury. First, defendants contend that under circuit precedent, prison guards may use force against inmates who are refusing to comply with orders. They cite *Soto v. Dickey*, 744 F.2d 1260, 1267

(7th Cir. 1984), in which the court of appeals stated that

> Orders given must be obeyed. Inmates cannot be permitted to decide which orders they will obey, and when they will obey them . . . . Inmates are and must be required to obey orders. When an inmate refuse[s] to obey a proper order, he is attempting to assert his authority over a portion of the institution and its officials. Such refusal and denial of authority places the staff and other inmates in danger.

However, the issue in this case is not whether plaintiff was required to obey staff's orders to remove the paper from his light, to walk down the hallway or to cooperate with defendants' attempts to remove his handcuffs. The issue is whether defendants' response to plaintiff's obstinance was reasonable under the circumstances or whether it was excessive and was intended to cause plaintiff harm.

Also, defendants cite several cases in which the court of appeals discusses the use of tasers in jail and prison. *E.g.*, *Lewis*, 581 F.3d at 476 (recognizing "the important role that non-lethal, hands-off means—including taser guns—play in maintaining discipline and order within detention facilities"); *Forrest*, 620 F.3d at 745 ("in a jail or prison setting, it is not hard to imagine any number of scenarios that would justify the [use of] . . . taser guns") (citation omitted). These cases are not particularly helpful to defendants, because the court of appeals has explained explicitly that whether an application of force is excessive depends on the circumstances. As the court of appeals explained in *Lewis*,

> In many circumstances—often when faced with aggression, disruption, or physical threat—compelling compliance with an order is a valid penological justification for use of a taser. But such justification does not necessarily exist every time an inmate is slow to comply with an order. What must be decided in each case . . . is whether the facts surrounding the taser's deployment . . . demonstrated actual malice or sadistic purpose on the part of the user.

Lewis, 581 F.3d at 477 (internal citations omitted).

In *Lewis*, the court of appeals also explained that the use of taser guns may be appropriate when "the victims have been violent, aggressive, confrontational, unruly, or presented an immediate risk of danger to themselves or others. . . . [because] [s]uch behavior certainly increases the need for force and often poses a threat to the security officers." *Id.* (collecting cases). If a jury accepted plaintiff's version of events in this case, it could conclude that the defendants' use of the taser was wanton and malicious because plaintiff was not violent, aggressive, unruly or even resistant and posed no threat to defendants.

Finally, I agree with plaintiff that defendants are not entitled to qualified immunity on plaintiff's excessive force claim. Qualified immunity applies whenever a government official's actions, even if unconstitutional, did not violate the "clearly established law" at the time. *Pearson v. Callahan*, 555 U.S. 223, 822 (2009); *Vinning-El v. Evans*, 657 F.3d 591, 594 (7th Cir. 2011). Once the defendant has raised a qualified immunity defense, the plaintiff has the burden to show that it should not apply. *Mannoia v. Farrow*, 476 F.3d 453, 457 (7th Cir. 2007). As explained above, a reasonable jury could conclude that

defendants acted with malice and intended to harm plaintiff when they used force against him. "The notion that unnecessary and wanton infliction of pain constitutes cruel and unusual punishment forbidden by the Eighth Amendment is not a new or unusual constitutional principle." *Hill v. Shelander*, 992 F.2d 714, 718 (7th Cir. 1993) (internal quotations and citations omitted). Nor is the notion that the Fourteenth Amendment provides at least as much protection from excessive force as the Eighth Amendment. *Wilson v. Williams*, 83 F.3d 870, 875 (7th Cir. 1996). Thus, defendants are not entitled to qualified immunity and are not entitled to summary judgment on plaintiffs' claim that defendants used excessive force against him in the receiving cell. *Lewis*, 581 F.3d at 478-79 (summary judgment inappropriate because there was genuine issue of fact regarding whether officer's use of taser was malicious and qualified immunity did not apply).

B. Due Process

Plaintiff and defendants have moved for summary judgment on plaintiff's claim that defendants Josvai and Fish violated his procedural due process rights under the Fourteenth Amendment by providing him no process before placing him in a receiving cell. To establish a procedural due process violation, plaintiff must show that he was deprived of a "liberty interest" and that this deprivation took place without the procedural safeguards necessary to satisfy due process. *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995); U.S. Const. amend. XIV. Plaintiff contends that he was entitled to receive at least as much process as convicted prisoners are entitled to receive, namely, advance written notice of the charges against him; a hearing before an impartial decision maker at which

he could have presented testimony and evidence; and, for any disciplinary action taken, a written explanation, supported by at least "some evidence" in the record. *Wolff v. McDonnell*, 418 U .S. 539, 563-71(1974); *Lagerstrom v. Kingston*, 463 F.3d 621, 624 (7th Cir. 2006). Plaintiff contends that he was denied due process because (1) he was not given copies of the incident reports before he was found guilty of violating jail rules; (2) he was not given a hearing at which he could present evidence and witnesses; (3) defendant Fish, the decision maker, was not impartial because she had decided that plaintiff was guilty of the charges and should be placed in segregation for 10 days before she offered plaintiff a hearing; (4) defendant Fish did not explain the reason for the disciplinary sentence she imposed; and (5) defendant Josvai failed to correct Fish's due process violations on appeal.

I agree with plaintiff that defendant Fish would not have been an impartial decision maker who could have conducted a hearing in compliance with the due process requirements set forth in *Wolff*, 418 U .S. at 563-71. Fish had made up her mind about plaintiff's guilt and the punishment he should receive before listening to plaintiff's version of events or any testimony from plaintiff's witnesses. Additionally, I agree with plaintiff that he did not waive his right to a hearing by telling Fish that he did not understand his hearing rights. Nonetheless, I conclude that plaintiff cannot establish a violation of his due process rights.

In *Rapier v. Harris*, 172 F.3d 999 (7th Cir. 1999), the court of appeals held that a pretrial detainee cannot be punished for disciplinary infractions that occur during detention without being afforded due process. *Id.* at 1005-06. However, the court of appeals has also

explained that the due process clause does "not confer a right to a *predeprivation* hearing in every case in which a public officer deprives an individual of liberty or property." *Holly v. Woolfolk*, 415 F.3d 678, 680 (7th Cir. 2005) (emphasis added). In *Holly*, the court of appeals held that a pretrial detainee's placement in segregation for two days without a prior hearing did not violate his due process rights. *Id.* at 680-81. Corrections officers had reason to believe that the detainee was disrupting a jail headcount, which had the potential to interfere with jail security and discipline. In finding no due process violation, the appellate court analogized the two-day detention to the 48 hours in which a person can be arrested and held before being charged with a crime or given a hearing. *Id.* at 680-81. *See also Protect Marriage Illinois v. Orr*, 463 F.3d 604, 608 (7th Cir. 2006) ("what is required in the name of due process depends" on circumstances). More recently, the court of appeals explained that "[d]isciplinary measures that do not substantially worsen the conditions of confinement of a lawfully confined person are not actionable under the due process clause, regardless of whether the confinement is criminal or civil." *Miller v. Dobier*, 634 F.3d 412, 415 (7th Cir. 2011) (citing *Sandin*, 515 U.S. at 485-86).

Like the pretrial detainee in *Holly*, plaintiff was held in a receiving cell for only two days because defendant Conroy released him after determining that plaintiff should have been given a hearing. As in *Holly*, the defendants had valid managerial reasons for placing plaintiff in the receiving cell initially. In particular, it is undisputed that plaintiff refused several orders from jail staff to remove the paper from his light and that he had to be removed from his cell so that staff could remove the paper. As the court

explained in *Holly*, it may be appropriate for jail staff to separate a detainee without providing him a hearing when staff has "probable cause to believe [he] has violated a disciplinary rule." *Id.* at 681. In other words, a limited detention of a pretrial detainee while he is awaiting a hearing is constitutionally permissible. *Id.*; *see also Dunkin v. Dart*, 2010 WL 3547969, *5 (N.D. Ill. Sept. 2, 2010) ("plaintiff had no right to remain in the general population prior to the disciplinary hearing"); *Williams v. County of Cook*, 2010 WL 3324718, *7-8 (N.D. Ill. Aug. 19, 2010) (being held for 10 days in segregation before hearing did not violate pretrial detainee's due process rights). In this case, plaintiff was never provided a hearing or opportunity to be heard. However, he never received any punishment beyond the two days in spent in the receiving cell. Under the circumstances, the mere fact that plaintiff was segregated from the general population for a short time is not sufficient by itself to rise to a violation of his due process rights. Therefore, I will deny plaintiff's motion for summary judgment on this claim and grant summary judgment to defendants.

ORDER

IT IS ORDERED that

1. Plaintiff Michael Kingsley's motion for partial summary judgment, dkt. #21, is DENIED.

2. The motion for summary judgment filed by defendants Lisa Josvai, Patricia Fish, Robert Conroy, Stan Hendrickson, Fritz Degner and Karl Blanton, dkt. #26, is GRANTED IN PART AND DENIED IN PART. Defendants' motion is DENIED with respect to plaintiff's claims that defendants Conroy, Hendrickson, Degner and Blanton used excessive force

against plaintiff in violation of the Eighth Amendment after plaintiff had been carried to a receiving cell on May 21, 2010. Defendants' motion for summary judgment is GRANTED in all other respects.

Entered this 16th day of November, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed: 9/07/12]

10-CV-832

MICHAEL B. KINGSLEY,

Plaintiff,

v.

LISA JOSVAI, PATRICIA FISH, ROBERT CONROY, STAN HENDRICKSON, FRITZ DEGNER AND KARL BLANTON,

Defendants.

PROPOSED JURY INSTRUCTIONS OF DEFENDANTS FOR LIABILITY PHASE OF TRIAL

Pursuant to the Court's Preliminary Pretrial Conference Order and Procedures Governing Final Pretrial Conference, defendants, Robert Conroy, Stan Hendrickson, Fritz Degner, and Karl Blanton, hereby submit their proposed jury instructions for the liability phase of trial. Defendants request these jury instructions without waiving their right to amend, supplement, or withdraw all or any portion of these instructions as the evidence and the Court's rulings at trial may dictate.

Defendants wish to include the following Standard Jury Instructions – Civil as provided by the Court along with the Preliminary Pretrial Conference Order:

Introductory Instructions

(1) Introductory Instruction

(2) Credibility of Witnesses

(3) Depositions

(4) Objections

(5) Questions

(6) Notetaking

(7) Evidence

(8) Contradictory or Impeaching Evidence

(9) Drawing of Inferences

(10) Experts

Post-Trial Instructions

(1) Introduction

(2) Burden of Proof

(3) Answers Not Based on Guesswork

(4) Selection of Presiding Juror; Communication with the Judge; Verdict

(5) Suggestions for Conducting Deliberations

In addition to these standard jury instructions, defendants request the additional instructions set forth below.

Defendants' Proposed Instruction 1: Multiple Claims; Multiple Plaintiffs/Defendants

You must give separate consideration to each claim and each party in this case. Although there are *four individual* defendants, it does not follow that if one is liable, any of the others is also liable. In considering a claim against a defendant, you must not consider evidence admitted only against other defendants.

Source: Seventh Circuit Pattern Jury Instructions – Civil § 1.25.

Defendants' Proposed Instruction 2: Dismissed Defendants

Lisa Josvai and Patricia Fish are no longer defendants in this case. You should not consider any claims against Ms. Josvai or Ms. Fish. Do not speculate on the reasons. You should decide this case as to the remaining parties.

Source: Seventh Circuit Pattern Jury Instructions – Civil § 1.26.

Defendants' Proposed Instruction 3: Police Department/Municipality not a Party

Defendants are being sued as individuals. *No municipal entity, including Monroe County*, is a party to this lawsuit.

Source: Seventh Circuit Pattern Jury Instructions – Civil § 7.01.

Defendants' Proposed Instruction 4: Impeachment of Witness – Convictions

You have heard evidence that Plaintiff has been convicted of a crime. You may consider this evidence only in deciding whether Plaintiff's testimony is truthful in whole, in part, or not at all. You may not consider this evidence for any other purpose.

Source: Seventh Circuit Pattern Jury Instructions – Civil § 1.15.

Defendants' Proposed Instruction 5: Excessive Force

In this case, Plaintiff claims that Defendants used excessive force against him. To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that the force used by Defendants was not applied in a good faith effort to maintain or restore discipline, but was instead applied maliciously or sadistically for the very purpose of causing harm.

In deciding whether Plaintiff has proved that Defendants used excessive force, you may consider such factors as:

- the need for the application of force;
- the relationship between the need for the use of force and the amount of force used;
- the extent of the injury inflicted;
- the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them; and
- any efforts made by the Defendants to temper or limit the amount of force.

Source: *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992); *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986); Dkt. No. 69, p. 11.

Defendants' Proposed Instruction 6: Battery

Question _____ asks you to determine whether Defendants (used excessive force) *battered* (in arresting) Plaintiff. It is admitted that Defendants made contact with Plaintiff and used force *against him* (at the time of making the arrest), which force, if not reasonable under the circumstances, would constitute a battery.

As law enforcement officers, Defendants (had) *have* the duty to *maintain the safety and security of the jail* (enforce the laws of Wisconsin) and (in making an arrest) may use reasonable force to overcome the resistance of *a prisoner* (the person being arrested). This force, however, must not be excessive; that is, the officer must not use more force than necessary under all of the circumstances.

The fact that the evidence in this case shows physical contact between Defendants and Plaintiff (which resulted in injury to Plaintiff,) is not proof that Defendants used excessive force.

Defendants had the lawful authority to use such force (in making the arrest) as a reasonable (police) officer would believe to be necessary. But the use of force beyond that which a reasonable (police) officer would believe necessary under all the circumstances then existing is excessive force.

(The fact that defendant believed plaintiff was guilty of a crime is irrelevant. Persons being arrested have a right not to be mistreated by the use of excessive force.)

Source: Wisconsin Jury Instruction – Civil: 2008.

Dated this 7th day of September, 2012.

s/ Andrew A. Jones
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed: 9/07/12]

10-CV-832

MICHAEL B. KINGSLEY,

Plaintiff,

v.

LISA JOSVAI, PATRICIA FISH, ROBERT CONROY, STAN HENDRICKSON, FRITZ DEGNER AND KARL BLANTON,

Defendants.

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

Plaintiff, by his undersigned attorneys, submits the attached proposed jury instructions, to be given in addition to the Court's standard jury instructions.

With respect to the Court's standard post-trial jury instructions, Plaintiff believes that the following instructions are not necessary or an alternate instruction should be used:

"Middle Burden of Proof" (not necessary)

"Duty to Mitigate Damages" (not necessary)

"Mortality Tables" (not necessary)

"Future Earnings" (not necessary)

"Pain and Suffering" (modified)

Dated: September 7, 2012

Respectfully submitted,

MERCHANT & GOULD, P.C.

By: */s/ Joel F. Graham*

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PLAINTIFF'S PROPOSED INSERTION FOR THE COURT'S STANDARD INTRODUCTORY INSTRUCTION

Plaintiff proposes the following insertion beginning at the second paragraph of the Court's standard Introductory Instructions:

The party who begins the lawsuit is called the plaintiff. In this action, the plaintiff is Michael Kingsley. The parties against whom the suit is brought are called the defendants. In this action, the defendants are Stanley Hendrickson, Robert Conroy, Fritz Degner, and Karl Blanton. The defendants are employees of the Monroe County Jail. The plaintiff, Mr. Kingsley, alleges that the defendants used excessive force against him while he was an inmate at the jail. Excessive force in this context means unreasonable force under the totality of the circumstances. You will receive further instruction on how to evaluate this after the parties have presented their case.

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 1

ALL PERSONS EQUAL BEFORE THE LAW

This case should be considered and decided by you as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons stand equal before the law and are to be treated as equals.

Authority: 3B Kevin F. O'Malley et al., Federal Jury Practice and Instructions: Civil § 103:11 (6th ed. 2011).

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 2

CONSIDERATION OF ALL EVIDENCE REGARDLESS OF WHO PRODUCED

In determining whether any fact has been proved, you should consider all of the evidence bearing on the question regardless of who introduced it.

Authority: Federal Civil Jury Instructions of the Seventh Circuit § 1.08 (2005 rev.)

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 3 (IF NEEDED)

IMPEACHMENT OF WITNESS CONVICTIONS

You have heard evidence that *Michael Kingsley* has been convicted of a crime. You may consider this evidence only in deciding whether *Michael Kingsley's* testimony is truthful in whole, in part, or not at all. You may not consider this evidence for any other purpose.

Authority: Federal Civil Jury Instructions of the Seventh Circuit § 1.15 (2005 rev.) (modified).

The material deleted from the pattern instruction was originally in brackets. According to the Seventh Circuit Jury instructions, "[p]hrases and sentences that appear in brackets are alternatives or additions to instructions, to be used when relevant to the particular case on trial." For clarity, Plaintiff has not indicated the deletion of material that was originally in brackets in the pattern instruction.

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 4

NUMBER OF WITNESSES

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a large number. You need not accept the testimony of the larger number of witnesses.

Authority: Federal Civil Jury Instructions of the Seventh Circuit § 1.17 (2005 rev).

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 5

NATURE OF THE ACTION

Plaintiff *Michael Kingsley* claims damages alleged to have been sustained as the result of a deprivation, under color of state law, of a right secured to plaintiff *Michael Kingsley* by the (Fourth Amendment) *Fourteenth Amendment* of the United States Constitution and by a federal statute protecting the civil rights of all persons within the United States.

Specifically, plaintiff *Michael Kingsley* alleges that defendant (police officers) *Monroe County Sheriff's Department employees* subjected plaintiff Michael Kingsley to deprivation of rights and privileges secured and protected by the Constitution and laws of the United States, namely the Constitutional right to be free from the excessive use of force against plaintiff's person (during the course of an arrest) *while a pretrial detainee*.

(Defendant police officers deny that any of their actions during the time in question violated plaintiff's constitutional rights. Defendant police officers *allege* that they were acting in good faith and with probable cause and that their actions were reasonable. Defendant police officers further claim that they were not guilty of any fault or wrongdoing in regard to the incident sued upon.)

The defendants are Stan Hendrickson, Robert Conroy, Fritz Degner, and Karl Blanton.

Authority: 3B Kevin F. O'Malley et al., Federal Jury Practice and Instructions: Civil § 165.01 (5th ed. 2001) (modified).

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 6

FOURTH AMENDMENT / FOURTEENTH AMENDMENT: EXCESSIVE FORCE AGAINST (ARRESTEE OR PRETRIAL DETAINEE ELEMENTS

In this case, Plaintiff claims that Defendants used excessive force against him. To succeed on this claim, Plaintiff must prove (each of the following things) by a preponderance of the evidence *that Defendants used unreasonable force against him.*

(1. Defendant used unreasonable force against Plaintiff;)

Special Verdict Question No. 1 asks you to evaluate whether unreasonable force was used against Plaintiff. You should evaluate this question separately with respect to each individual Defendant.

If you find that Plaintiff has proved (each of these things) *the use of unreasonable force* by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff did not prove *the use of unreasonable force* (any one of these things) by a preponderance of the evidence, then you should find for Defendants, and you will not consider the question of damages.

Authority: Federal Civil Jury Instructions of the Seventh Circuit § 7.08 (2005 rev.) (modified); Committee Comments to Federal Civil Jury

Instructions of the Seventh Circuit $ 7.08 (b), (c). (d); Defendants' Response to Plaintiff's Request for Admission No. I (admitting actions were done under color of law).

Some material deleted from the pattern instruction was originally in brackets. According to the Seventh Circuit Jury instructions, "[p]hrases and sentences that appear in brackets are alternatives or additions to instructions, to be used when relevant to the particular case on trial." For clarity, Plaintiff has not indicated the deletion of material that was originally in brackets in the pattern instruction.

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 7

FOURTH AMENDMENT / FOURTEENTH AMENDMENT: EXCESSIVE FORCE DEFINITION OF "UNREASONABLE"

You must decide whether *each individual* Defendant's use of force was unreasonable from the perspective of a reasonable officer facing the same circumstances that *he* (Defendant) faced. You must make this decision based on what the officer knew at the time of the *incident*, (arrest,) not based on what you know now. In deciding whether *the* (Defendant's) use of force was unreasonable, you must not consider whether *that person's* (Defendant's) intentions were good or bad.

In performing his job, an officer can use force that is reasonably necessary under the circumstances.

In considering whether the use of force was unreasonable, you may consider

The need for the use of force;

The relationship between the need for the use of force and the amount of force used;

- *The extent of the Plaintiff s injury;*

Any efforts made by the officer to temper or limit the amount of force;

The severity of the crime at issue; and

The threat reasonably perceived by the officer.

Authority: Federal Civil Jury Instructions of the Seventh Circuit § 7.09 (2005 rev.) (modified); Committee Comments to Federal Civil Jury Instructions of the Seventh Circuit § 7.09 (b).

Some material deleted from the pattern instruction was originally in brackets. According to the Seventh Circuit Jury instructions, "[p]hrases and sentences that appear in brackets are alternatives or additions to instructions, to be used when relevant to the particular case on trial." For clarity, Plaintiff has not indicated the deletion of material that was originally in brackets in the pattern instruction.

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 8

FAILURE BYSTANDER OFFICER TO INTERVENE

In the case of Defendant Robert Conroy, you may also find he is liable for excessive force if he failed to stop any of the other defendants from using excessive force. To succeed on *this* (his failure to intervene) claim, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. *At least one of the other defendants used unreasonable force on Mr. Kingsley*;
2. *Lt. Conroy* (Defendant) knew that *at least one of the other defendants* was about to *use unreasonable force on Mr. Kingsley*;
3. *Lt. Conroy* (Defendant) had a realistic opportunity to do something to prevent *the unreasonable use of force* (harm) from occurring;
4. *Lt. Conroy* (Defendant) failed to take reasonable steps to prevent *the unreasonable use of force* (harm) from occurring.(;)
5. (Defendant's failure to act caused Plaintiff to suffer harm ;).

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, *and that none of the other defendants used unreasonable force*, (then you should find for Defendant, and) you will not consider the question of damages.

Authority: Federal Civil Jury Instructions of the Seventh Circuit § 7.16 (2005 rev.) (modified); Defendants' Response to Plaintiff's Request for Admission No. 1 (admitting actions were done under color of law)

Some material deleted from the pattern instruction was originally in brackets. According to the Seventh Circuit Jury instructions, "[p]hrases and sentences that appear in brackets are alternatives or additions to instructions, to be used when relevant to the particular case on trial." For clarity, Plaintiff has not indicated the deletion of material that was originally brackets.

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 9

DAMAGES: PREFATORY INSTRUCTION

If you find that Plaintiff has proved any of his claims against *at least one* of the Defendants, then you must determine what amount of damages, if any, Plaintiff is entitled to recover.

If you find that Plaintiff has failed to prove all of his claims, then you will not consider the question of damages.

Authority: Federal Civil Jury Instructions of the Seventh Circuit § 7.22 (2005 rev.) (modified).

Some material deleted from the pattern instruction was originally in brackets. According to the Seventh Circuit Jury instructions, "[p]hrases and sentences that appear in brackets are alternatives or additions to instructions, to be used when relevant to the particular case on trial." For clarity, Plaintiff has not indicated the deletion of material that was originally in brackets in the pattern instruction.

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 10

DAMAGES: COMPENSATORY

Special Verdict Question No. 2 asks you about compensatory damages. If you find *that at least one Defendant used unreasonable force against Plaintiff, then you must determine whether Plaintiff was harmed by that unreasonable force and if so,* (in favor of Plaintiff,) then you must determine the amount of money that will fairly compensate Plaintiff. (for any injury that you find he sustained as a direct result of)

These are called "compensatory damages."

Plaintiff must prove his damages by a preponderance of the evidence. Your award must be based on evidence and not speculation or guesswork. This does not mean, however, that compensatory damages are restricted to the actual loss of money; they include both the physical and mental aspects of injury, even if they are not easy to measure.

In this case, you (You) should consider *pain and suffering*. (the following types of compensatory damages, and no others:)

In determining how much money will fairly and reasonably compensate Plaintiff for past pain and suffering, you should consider any pain and suffering, mental anguish and apprehension, sorrow and anxiety plaintiff has endured from the time of the incident up to the present time. There is no exact standard for deciding how much to award plaintiff for these damages. Your award should be fair and just in light of the evidence.

Authority: Federal Civil Jury Instructions of the Seventh Circuit § 7.23 (2005 rev.) (modified); Court Standard Jury Instructions. The Seventh Circuit Jury instruction was used as the "base" instruction for the purposes of underlining and deleting material, whereas the substance of the "pain and suffering" instruction comes from the Court's standard jury instructions.

Some material deleted from the pattern instruction was originally in brackets. According to the Seventh Circuit Jury instructions, "[p]hrases and sentences that appear in brackets are alternatives or additions to instructions, to be used when relevant to the particular case on trial." For clarity, Plaintiff has not indicated the deletion of material that was originally in brackets in the pattern instructions.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed: 9/28/12]

10-cv-832-bbc

MICHAEL B. KINGSLEY,

Plaintiff,

v.

ROBERT CONROY, STAN HENDRICKSON,
FRITZ DEGNER AND KARL BLANTON,

Defendants.

OPINION and ORDER

Plaintiff Michael Kingsley is proceeding with counsel on claims that defendants Robert Conroy, Stan Hendrickson, Fritz Degner and Karl Blanton used excessive force on him while he was a pretrial detainee, in violation of his rights under the Fourteenth Amendment. A trial is scheduled for October 9, 2012. Now before the court are the parties' motions in limine.

A. Plaintiff's Motions, dkt. #96

1. Motion to exclude evidence of criminal convictions barred by Fed. R. Evid. 609

Plaintiff moves under Fed. R. Evid. 609 to preclude defendants from offering evidence of (1) criminal charges or arrests brought against plaintiff that have

not resulted in a conviction; (2) criminal misdemeanor convictions that do not involve dishonesty; and (3) criminal convictions for which 10 years have elapsed since the date of the conviction or the release from confinement for the conviction. Defendants state in response that they plan to produce evidence of admit only those felony convictions that are less than 10 years old. Therefore, I am granting this motion as unopposed.

2. Motion to exclude collateral details of any admissible convictions

For those felony convictions that are admissible under Rule 609, plaintiff requests that defendants be precluded from providing the details underlying the convictions. I am granting this motion as unopposed.

3. Motion to exclude evidence of other acts, discipline, grievances, lawsuits and threats

Plaintiff seeks to exclude evidence relating to incidents involving plaintiff that occurred at the Monroe County jail both before and after the incident in this case, including all disciplinary incidents involving plaintiff and any threats, grievances and lawsuits plaintiff made or filed that were unrelated to the May 21, 2010 incident at issue. Defendants do not oppose the motion with respect to evidence relating to disciplinary incidents involving plaintiff that occurred after May 21, 2010. However, defendants contend that they are entitled to introduce evidence regarding incidents occurring before this date because those incidents informed defendants' assessment "of the nature and extent of the threat posed by plaintiff's disobedience and resistance on May 21" and their understanding of plaintiff's behavior. Dfts.' Br., dkt. #116, at 2.

I am granting plaintiff's motion, with one exception. Evidence of plaintiff's previous behavior is improper character evidence, unfairly prejudicial and irrelevant to plaintiff's excessive force claim, unless other evidence shows that defendants knew that plaintiff had a history of assaultive or threatening behavior towards jail employees. Because this is an excessive force case, defendants' state of mind is a relevant issue. Thus, defendants are entitled to show the jury that their actions toward plaintiff were not the product of malicious intent, but were based upon their legitimate considerations of staff safety and institutional security and their concern that plaintiff would engage in assaultive behavior. *West v. Love*, 776 F.2d 170, 174-175 (7th Cir. 1985) (plaintiff's prior acts of institutional violence cannot be used to prove he acted in similar fashion in case at hand, but can be used to show state of mind of correction officers to defend against plaintiff's claim of excessive force) (citing *Lataille v. Ponte*, 754 F.2d 33, 36 (1st Cir. 1985)). However, if defendants did not know or had no reason to believe that plaintiff had a history of violent or threatening behavior, evidence of plaintiff's prior discipline is irrelevant to the reasonableness of their actions and state of mind on May 21, 2010. *Geitz v. Lindsey*, 893 F.2d 148, 151 (7th Cir. 1990) ("for the jury to determine the reasonableness of the defendants' actions, it must evaluate the defendants' conduct in light of what the defendants knew at the time of the shooting . . . ."); *McCrary-El v. Shaw*, 992 F.2d 809, 812 (8th Cir. 1993) ("The amount of force reasonably necessary to subdue prisoners is not the same for all prisoners. . . . In other words, the question of excessiveness of force cannot he assessed in a vacuum; it will vary from circumstance to circumstance.").

However, the two examples of previous acts identified by defendants in their response brief are not admissible in any circumstance. Defendants have said that they intend to introduce evidence that in January 2003, plaintiff had to be extracted from his cell and moved to a receiving cell for arguing with staff and that in May 2005, plaintiff had to be extracted for failure to follow inmate rules. Dfts.' Br., dkt. #116, at 2. These prior incidents occurred five and seven years before the incident in this case, and nothing about them suggests that plaintiff acted in a threatening or violent manner that would have caused the defendants to believe that plaintiff posed a greater risk of harm than any other inmate who is being moved to a receiving cell. The incidents suggest only that plaintiff did not always follow orders. Such evidence would merely prejudice the jury and would not be probative of defendants' mental state.

In sum, defendants may introduce evidence of plaintiff's prior bad behavior only if it involved violent or threatening behavior of which defendants were aware. To the extent such evidence exists, defendants are limited to discussing plaintiff's history in general terms and may not refer to specific conduct reports or attempt to introduce them. *West*, 776 F.2d at 175 (evidence admitted for permissible purposes must be "strictly limited to avoid undue prejudice"); *Young v. Rabideau*, 821 F.2d 373, 382 (7th Cir. 1987) (district judge minimized danger of unfair prejudice by prohibiting disciplinary record from being admitted into evidence and permitting only general questions about it).

4. Motion to exclude undisclosed expert testimony

Plaintiff's fourth motion in limine seeks to preclude defendants from using undisclosed expert testimony. I

am denying this motion. Defendants disclosed John Peters as an expert witnesses and filed an expert report prepared by him. Additionally, defendants identified Dr. Aaron Butler, Dr. James Deming and Vicky Bethke as non-retained expert witnesses who may be called to provide expert testimony regarding the care and treatment they provided to plaintiff. Dkt. #100-1. Because defendants' disclosures comply with Fed. R. Civ. P. 26(a) (2), defendants may elicit expert testimony from these witnesses. Defendants state that they do not intend to elicit expert testimony from any other witnesses. Thus, plaintiff's motion to exclude undisclosed expert testimony is unnecessary.

5. Motion to permit plaintiff to appear at trial in street clothes and without restraints

Plaintiff's final request is that he be permitted to appear at trial in street clothes and without handcuffs or leg shackles. Defendants do not oppose the motion and I will grant it. However, it is the responsibility of plaintiff's counsel to insure that plaintiff has access to street clothes for use during trial.

B. Defendants' Motions, dkt. #89

1. Motion to exclude or limit testimony from plaintiff's expert Brian Landers

Plaintiff identified Brian Landers as an expert witness who will testify about whether defendants' use of force was excessive. Defendants have moved under Fed. R. Evid. 702 to preclude Landers from testifying, contending that he lacks the necessary qualifications and experience to offer expert testimony. In the alternative, defendants argue that Landers' testimony should be substantially limited as unreliable, irrelevant or prejudicial.

a. Landers' qualifications

Specifically, defendants contend that Landers is unqualified because he has never worked as a corrections officer, has never conducted any corrections training or taught any course at the state-mandated corrections training academy and has never taught using the Wisconsin Principles of Subject Control Manual, the manual used to teach corrections officers in Wisconsin.

In determining whether an expert is qualified to render an opinion in a given area, courts "should consider a proposed expert's full range of practical experience as well as academic or technical training." *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000). After reviewing Landers' expert report and affidavit, I conclude that Landers has sufficient academic and technical training as well as practical experience to qualify as an expert on the use of force in a county jail. Landers worked as a police officer for many years, and his duties included transporting offenders to and from jail, booking offenders, working with jail staff and managing a Wisconsin Dells' holding cell that operated as a temporary jail. Although defendants contend that Landers' experience as a police officer and manager of a holding cell is too different from that of deputies working in a jail setting, they do not explain why that is so. According to Landers, as a police officer, he received training and had duties similar to that of deputies working in a jail setting.

With respect to his academic and technical training, Landers has a degree in Criminal Justice Administration and has taught criminal justice and law enforcement training for several years. In his current position at Madison College, he administers

all law enforcement and jail training academies, as well as specialized training for law enforcement, corrections, dispatching and public safety. The largest client of the police academy is Dane County, whose employees work at the Dane County jail. From this, I infer that Landers is knowledgeable about jail settings and has taught officers working in jail settings. Landers personally teaches a wide variety of courses within the police academy, including specialized training classes on defensive tactics, firearms, tactical response and ethics. His primary teaching experience includes training others using the Wisconsin Defensive and Arrest Tactics Manual. Although defendants contend that the Defensive and Arrest Tactics Manual used by law enforcement officers is different from the Principles of Subject Control Manual used by corrections officers, they do not explain what the differences are or why they matter. According to Landers, both manuals are based on the Wisconsin Disturbance Resolution Model and share substantially the same content. In particular, Landers states that the physical control tactics in both manuals are virtually identical in theory, concept and application. I conclude that Landers is an expert on the subject at issue in this case, and possesses the requisite training, education and experience to testify about the appropriate use of force in a jail setting.

b. Defendants' request to exclude specific portions of Landers' testimony

Defendants contend that if Landers' is not precluded from testifying completely, his testimony should be limited substantially under Fed. R. Evid. 402, 403 and 702. Specifically, defendants seek to preclude Landers from testifying that (1) plaintiff's version of events is credible or possible; (2) defendants applied the

handcuffs to plaintiff incorrectly; (3) the video footage supports his conclusions; (4) the officers could have waited for plaintiff to calm down rather than use the taser; and (5) defendants failed to comply with Wis. Admin. Code DOC § 350.14.

I am denying most of defendants' requested limitations. I agree with defendants that Landers may not testify that plaintiff's version of events is "credible" because that is a question for the jury. *Goodwin v. MTD Products, Inc.*, 232 F.3d 600, 609 (7th Cir. 2000) ("[C]redibility questions are within the province of the trier of fact, in this case a jury."). However, Landers may testify that the evidence supports plaintiff's version of events. In his report, Landers considered plaintiff's allegation that he was not fighting or struggling with the officers, but rather that he may have "tensed up" because the handcuffs kept getting tighter and because defendant Hendrickson put his weight on plaintiff. Landers concluded that plaintiff's testimony was consistent with the evidence he reviewed. In particular, Landers concluded from reviewing the incident reports and the video that the handcuffs could have been tightening because they were not applied correctly. This testimony is admissible and would be helpful to the jury in determining whether to believe plaintiff. It does not go to whether plaintiff is credible, but rather whether plaintiff's version of events is possible. *Smith*, 215 F.3d at 718-19 ("Where an expert's hypothetical explanation of the possible or probable causes of an event would aid the jury in its deliberations, that testimony satisfies *Daubert*'s relevancy requirement."); *Walker v. Soo Line Railroad Co.*, 208 F.3d 581, 587 (7th Cir. 2000) (expert's "testimony could assist the trier of fact even if he cannot say with complete certainty that

electrical trauma caused Mr. Walker's decline in functioning").

On a related issue, I conclude that Landers may also testify about whether the handcuffs were applied to plaintiff properly, though he may not give the opinion that the use of handcuffs was unreasonable or constituted excessive force. As explained more fully below, this testimony about the application of the handcuffs is relevant to plaintiff's explanation of why he may have been "tensed up" in the receiving cell and whether defendants knew that plaintiff was reacting because he was in pain, rather than because he was resisting orders.

I will not preclude Landers from referring to the video footage during his testimony. Although defendants argue that the jury is capable of deciding what was happening on the video, Landers used the video footage to form his opinions and he may use the video footage to explain the bases for those opinions. Otherwise, it would be difficult for Landers to explain exactly why he believes it was unreasonable for defendants to use the taser on plaintiff.

Further, I will not preclude Landers from testifying that there was no "pressing hazard" that would have prevented defendants from properly handcuffing plaintiff, backing off in the receiving cell or using a lower level of force. As an initial matter, defendants have never suggested that there was a "pressing hazard" that prevented them from handling the situation differently. Thus, Landers' opinion is based on defendants' own description of the circumstances. Moreover, although defendants argue that Landers is unqualified to offer an opinion about what may or may not be a pressing concern in a jail, I have concluded already that Landers is qualified to testify about

issues that arise in a jail setting and whether defendants could have used an alternative method of dealing with plaintiff.

Defendants object to the references to and interpretation of Wis. Admin. Code § DOC 350.14, titled "Use of force," in Landers' expert report, contending that Landers is unqualified to offer his interpretation of that provision. I agree with defendants. Landers may not offer his opinion about the meaning of a state regulation. Not only is it inappropriate for experts to provide interpretation of the law, but the interpretation of that provision is irrelevant to this case. *United States v. Caputo*, 517 F.3d 935, 942 (7th Cir. 2008) (affirming exclusion of expert testimony about meaning of statutes and regulations, stating "[t]hat's a subject for the court, not for testimonial experts"). Plaintiff has not sued defendants for violation of that particular regulation, which means that it is not necessary to determine whether defendants complied with it. The issue in this case is whether defendants' use of force was so excessive that it violated the Constitution. It will be confusing to the jury if the parties start arguing about whether defendants complied with particular provisions of state law. Landers may rely on his own education, experience and the principles he uses in his teaching to offer opinions about whether defendants' use of force was excessive under the circumstances.

c. Landers' conclusion that defendants' use of force was "unreasonable"

Finally, defendants contend that Landers' opinions should be excluded because they are based on the incorrect legal standard. In his expert report, Landers concludes that defendants' use of force was "unreasonable" under the test set forth in *Graham v.*

Connor, 490 U.S. 386, 397 (1989). In that case, the Supreme Court considered whether a police officer's exercise of force during an investigatory stop was excessive under the Fourth Amendment. *Id.* at 394. Defendants contend that because this case falls under the Fourteenth Amendment, Landers applied the incorrect standard, making his conclusions unreliable and irrelevant. Plaintiff disagrees, contending that Landers applied the correct standard to plaintiff's claim.

As an initial matter, regardless what the standard is, Landers may not offer opinions about the applicable law or factors that should be considered by the jury. Also, plaintiff may not ask Landers his opinion about whether defendants violated the Constitution under any test. The correct legal standard is a question for the court and whether defendant violated the law is a question for the jury.

Although the parties are arguing about Landers' opinions, their dispute is really about the standard that should be applied to plaintiff's excessive force claim. Defendants contend that the correct standard is the standard for excessive force under the Eighth Amendment, which requires plaintiff to show more than an "unreasonable" use of force. Under the Eighth Amendment, a plaintiff must show that defendants used force "maliciously and sadistically for the very purpose of causing harm," rather than "in a good faith effort to maintain or restore discipline." *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992) (quoting *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)). In other words, unlike the Fourth Amendment test, the Eighth Amendment test requires plaintiffs to prove that the defendants had a particular underlying intent or motivation. On the other side, plaintiff contends that

because he was a pretrial detainee covered by the due process protections of the Fourteenth Amendment, rather than the Eighth Amendment, his claim should be covered by a more lenient standard.

The status of a pretrial detainee falls somewhere between the status of a free citizen, governed by the Fourth Amendment's "objective reasonableness" standard, and a convicted prisoner," governed by the "cruel and unusual punishment" or "unnecessary and wanton infliction of pain" standard of the Eighth Amendment. *Wilson v. Williams*, 83 F.3d 870, 875 (7th Cir. 1996) (citations omitted). Plaintiff is correct that because he was a pretrial detainee who had not been convicted and sentenced at the time he alleges his constitutional rights were violated, his claim is governed by the due process protections of the Fourteenth Amendment. *Forrest v. Prine*, 620 F.3d 739, 743 (7th Cir. 2010); *Estate of Moreland v. Dieter*, 395 F.3d 747, 758 (7th Cir. 2005). As the court of appeals has explained in a similar context:

> The scope of an individual's right to be free from punishment—and, derivatively, the basis for an excessive force action brought under § 1983—hinges on his status within the criminal justice system. On one end of the spectrum are sentenced prisoners. The Eighth Amendment protects these individuals only from the infliction of cruel and unusual punishment, which is often defined in the prison context as the unnecessary and wanton infliction of pain.
>
> Pretrial detainees, by contrast, have not been convicted or sentenced and thus are not yet punishable under the law. As such, pretrial detainees couch excessive force claims as violations of their Fourteenth Amendment rights

> to due process, not infringements on the Eighth Amendment's ban on cruel and unusual punishment.

Forrest, 620 F.3d at 744 (quoting *Lewis v. Downey*, 581 F.3d 467, 473 (7th Cir. 2009) (internal quotation marks and citations omitted)), Unfortunately, "the exact contours of any additional safeguards remain undefined" by the Supreme Court or the Court of Appeals for the Seventh Circuit. *Lewis*, 581 F.3d at 474; *Wilson*, 83 F.3d at 875 ("Whether the standard for excessive force claims is the 'reasonableness' standard of the Fourth Amendment, or some other intermediate standard, the Supreme Court has declined to say."). The court of appeals has stated only that "[t]he Fourteenth Amendment right to due process provides at least as much, and probably more, protection against punishment as does the Eighth Amendment's ban on cruel and unusual punishment." *Forrest*, 620 F.3d at 744.

Defendants cite *Forrest* and *Lewis*, in which the court of appeals applied Eighth Amendment standards to analyze the Fourteenth Amendment excessive force claims of pretrial detainees. However, the court noted specifically that the plaintiffs in those cases had not argued for a different standard. *Id.* ("Mr. Forrest has not explained, however, how any protections guaranteed by the Fourteenth Amendment provide him with more protection than he would receive under traditional Eighth Amendment standards. We therefore shall borrow Eighth Amendment standards to analyze Mr. Forrest's Fourteenth Amendment section 1983 claim."); *Lewis*, 581 F.3d at 475 (refusing to consider, absent the parties' raising the issue, "any safeguards the Fourteenth Amendment provides beyond those it

shares with the Eighth Amendment"). Similarly, in the summary judgment opinion in this case, I applied Eighth Amendment standards, noting that "[n]either plaintiff nor defendants have identified any protections guaranteed by the Fourteenth Amendment that would have provided plaintiff more protection than he would have received under traditional Eighth Amendment standards." Dkt. #69 at 10-11.

Now that plaintiff has counsel, he presents a persuasive argument that his Fourteenth Amendment excessive force claim should be governed by a more protective standard than the Eighth Amendment standard. Plaintiff cites *Wilson*, 83 F.3d 870, a Fourteenth Amendment pretrial detainee case, in which the court of appeals upheld the use of jury instructions borrowed from Fourth Amendment arrestee cases and noted that "'most of the time the propriety of using force on a person in custody pending trial will track the Fourth Amendment.'" *Id.* at 875-76 (quoting *Titran v. Ackman*, 893 F.2d 145, 147 (7th Cir. 1990)). However, the court went on to explain that whether defendants' conduct was unreasonable is only one part of the test for claims under the Fourteenth Amendment. Unlike Fourth Amendment claims, claims under the Fourteenth Amendment are not governed by a "wholly objective" test. *Id.* at 875. The factfinder must also determine whether the defendants acted with "reckless disregard" of the plaintiff's rights. *Id.* (citing *Anderson v. Gutschenritter*, 836 F.2d 346, 349 (7th Cir. 1988)). This standard is still more protective than the Eighth Amendment standard, because it does not require the plaintiff to prove that the defendants acted "maliciously and sadistically for the very purpose of causing harm."

In *Wilson*, the court of appeals concluded that the more protective standard was appropriate under the plaintiff's version of the facts, which were that a corrections officer threw him to the floor after the plaintiff laughed at him and a struggle between the two ensued. *Id.* at 872, 876. However, the court went on to explain that, in cases in which a guard was attacked in a prison and was acting in self-defense, the Eighth Amendment standard would arguably supplant the Fourth Amendment one. *Id.* at 876.

Defendants make no argument why the stricter Eighth Amendment standard should apply and why plaintiff's claim would fall under the prison disturbance scenario discussed in *Wilson*. After reviewing the allegations in this case and the case law, I am not convinced that the Eighth Amendment standard applies. The evidence in the record at this stage shows at most that plaintiff refused to relax his body and that defendants used a taser to gain his compliance. There was no "prison disturbance" under the meaning of *Wilson*. Thus, it is appropriate to apply the standard upheld in *Wilson* and consider whether defendants acted with reckless disregard for plaintiff's rights and behaved unreasonably "in light of the facts and circumstances." *Id.* at 875. *See also Richardson v. Jones*, 1:10-CV-01015, 2011 WL 31533 (W.D. Ark. Jan. 5, 2011) ("The courts generally analyze excessive force claims of pretrial detainees in the same way as those of arrestees" and consider "whether the officials behaved in a reasonable way in light of the facts and circumstances confronting them."); *Black v. Carey*, 07-CV-3317, 2010 WL 431916 (C.D. Ill. Jan. 29, 2010) (applying standard from *Wilson* and rejecting Eighth Amendment standard in excessive force case involving pretrial detainee); *Bonnin v. Eau Claire County*, 03-C-0065-C, 2004 WL 67478 (W.D. Wis. Jan. 13, 2004) ("In

determining whether force was excessive [under Fourteenth Amendment], the guiding inquiry is whether officials behaved in a reasonable way in light of the facts and circumstances confronting them. ").

Because the proper inquiry asks, in part, whether defendants' conduct was reasonable, Landers' opinions in his expert report about the reasonableness of defendants' actions under the circumstances are relevant and admissible. In forming his opinions, Landers considered factors that are relevant to the Fourth, Eighth and Fourteenth Amendment standards, including the need for force, the potential threat to officers and whether plaintiff was resisting or attempting to escape. *Wilson*, 83, F.3d at 876. Therefore, I will not preclude Landers from testifying as to these issues.

2. Motion to preclude plaintiff from introducing evidence that he was improperly handcuffed

At summary judgment, I dismissed plaintiff's claim that defendants used excessive force against him when they handcuffed him, pulled him off his bunk and carried him to the receiving cell. The only remaining claim relates to what happened after plaintiff was in the receiving cell. Defendants contend that the handcuffing is irrelevant to what happened in the receiving cell and thus, plaintiff should be precluded from introducing evidence and arguing that he was improperly handcuffed.

I am denying the motion. Plaintiff does not intend to argue that the handcuffing constituted excessive force, and such an argument would be improper. However, plaintiff intends to testify that the only reason he was "tensing" his body in the receiving cell was because the handcuffs were applied improperly and were too tight,

and not because he was "resisting." Plaintiff also intends to argue that defendants knew or should have known that plaintiff was in pain and not resisting. Plaintiff's expert, Brian Landers, plans to testify that plaintiff's version of events is possible because defendants' failure to use the safety lock on the handcuffs may have caused the handcuffs to tighten and plaintiff to tense up. This testimony is relevant to the events in the receiving room and will not be precluded.

3. Motion to preclude plaintiff from introducing evidence relating to his carpal tunnel syndrome in the damages phase of trial

Defendants move to preclude plaintiff from introducing evidence that the handcuffs used to restrain him during the incident in question caused him to develop carpal tunnel syndrome. At his deposition, plaintiff testified that he believed that to be the case. However, neither plaintiff's doctors nor any other witness disclosed in the case has offered testimony to support plaintiff's theory, and plaintiff states in his brief in response to defendants' motion in limine that he will not argue this theory. Plt.'s Br., dkt. #121, at 20. Therefore, I am granting defendants' motion as unopposed.

This ruling does not prevent plaintiff from arguing that the handcuffs exacerbated his carpal tunnel syndrome and contributed to any "tension" that he exhibited in the receiving cell if this is the case. Defendants' motion in limine does not address this theory, but I warn plaintiff that he may not offer testimony along these lines unless he has evidence from a medical expert to support his theory that handcuffs may exacerbate carpel tunnel syndrome or that his carpal tunnel syndrome could cause him to

tense up. Plaintiff's personal speculation about his carpal tunnel syndrome is not sufficient.

4. Motion to preclude plaintiff from arguing at trial that the taser was excessive because it failed to gain his compliance

Plaintiff contends that defendants had no good reason to tase him in the receiving cell because he was handcuffed on a bunk and presented no threat to defendants. He contends that defendants' actions immediately after tasing him confirm that the taser was unnecessary and used maliciously. In particular, after defendants tased plaintiff, he continued be unresponsive and defendants could not remove his handcuffs. Defendants exited the receiving cell and left plaintiff handcuffed on the cell bunk for several minutes. Plaintiff intends to argue that instead of tasing him, defendants could have let him lie on the bunk until he calmed down. Defendants contend that this line of argument should be precluded because it relies on "hindsight," instead of considering what the officers knew at the time they used the taser.

Defendants' argument is not persuasive. Factors relevant to determining whether force was excessive under the Fourteenth Amendment include (1) the need for the application of force; (2) the relationship between the need and the amount of force that was used; (3) the extent of injury suffered; (4) any threat reasonably perceived by the responsible officials; and (5) any efforts made to temper the severity of a forceful response. *Wilson*, 83 F.3d at 876 (citing *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)). The actions that defendants took after tasing plaintiff are directly relevant to the first, second and fourth factors. Plaintiff may present evidence and argument on this issue.

5. Motion to permit defendants to impeach plaintiff with evidence of his prior criminal convictions under Fed. R. Evid. 609

Defendants intend to impeach plaintiff using six prior felony convictions that are less than 10 years old. These convictions are:

(1) an October 14, 2011 conviction for possession of cocaine with intent to manufacture, distribute or deliver, in violation of Wis. Stat. § 961.41(1m) (cm) (1r);

(2) an October 3, 2008 conviction for manufacture, distribution or delivery of cocaine in violation of Wis. Stat. § 961.41(1) (cm) (1g);

(3)-(5) October 16, 2006 convictions for possession of THC with intent to manufacture, distribute or deliver in violation of Wis. Stat. § 961.41(1m) (h) (1), and for two counts of bail jumping in violation of Wis. Stat. § 946.49 (1) (b); and

(6) a July 14, 2005 conviction for possession of THC in violation of Wis. Stat. § 961.41 (3g)(e).

Defendants contend that these convictions are probative of plaintiff's truthfulness, while plaintiff contends that any probative value of these convictions is substantially outweighed by the danger of unfair prejudice to plaintiff and needlessly presenting cumulative evidence. For the most part, I agree with plaintiff. The jury will know already that the facts relevant to this case occurred while plaintiff was a detainee in a county jail and that plaintiff is now a prisoner in the custody of the Department of Corrections. Thus, they are aware that plaintiff has been convicted of crimes and may consider whether that affects his credibility. Additionally, the probative

value of the nature of the convictions is substantially outweighed by the potential for unfair prejudice under Rule 403. Accordingly, defendants may ask plaintiff how many felony convictions he has received in the past 10 years, but they cannot ask plaintiff (or any other witness) to describe the nature of those convictions.

6. Motion to preclude plaintiff from introducing evidence regarding the fact that plaintiff was referred to the Monroe County District Attorney's Office for criminal charges relating to the incident in question and the results of the referral

After the May 21, 2010 incident, the Monroe County Sheriff's Department referred plaintiff to the Monroe County District Attorney's office for possible criminal charges. The District Attorney's office brought misdemeanor charges against plaintiff for obstructing or resisting an officer and for disorderly conduct. The charges were later dismissed by the prosecutor. Defendants contend that any testimony or evidence relating to the charges and their dismissal should be precluded. I agree. The charges and their subsequent dismissal are irrelevant to the issues in this case and both parties will be precluded from discussing them at trial. Therefore, I am granting this motion.

7. Motion to preclude plaintiff from introducing evidence relating to other instances in which defendants or other Monroe County Sheriff's Department employees have used a taser

Before May 21, 2010, each of the defendants had been involved in incidents in which a taser had been used against prisoners at the Monroe County Jail. Defendants have moved to preclude plaintiff from introducing evidence about such incidents, contending

that such evidence is improper character evidence under Rule 404(b), is irrelevant and would be confusing and unfairly prejudicial.

I am denying the motion in large part. I agree with defendants that plaintiff should be precluded under Rule 404(b)(1) from offering evidence that defendants have used a taser on other prisoners, if plaintiff's purpose is to argue that defendants have a propensity for tasing prisoners unnecessarily. However, plaintiff states that he does not intend to offer such evidence for that purpose and does not plan on arguing that defendants' treatment of him was somehow in character for them. Rather, plaintiff says that the evidence is relevant under Rule 404(b)(2), which allows evidence of prior acts to prove "motive, opportunity, intent . . . absence of mistake, or lack of accident." Plaintiff intends to argue that defendants have *never* tased a prisoner at Monroe County jail who was handcuffed and in circumstances similar to those in this case; instead, defendants tase only those prisoners who are exhibiting violent or aggressive behavior. Plaintiff contends that this evidence is relevant to defendants' motivations in tasing him and in the reasonableness of their actions, particularly because defendants have argued that they acted in accordance with their experience and training.

Because plaintiff does not intend to use the evidence to argue that defendants "acted in accordance with [their] character" when they tased him, the evidence of defendants' prior acts involving tasers is not barred by Rule 404(b)(1). Additionally, I agree with plaintiff that the evidence is relevant to defendants' motivations in tasing plaintiff.

The question remains whether such evidence should be precluded as confusing and unfairly prejudicial.

Defendants contend that evidence of other incidents at the jail involving tasers will distract the jury and cause them to focus on whether the use of force was justified in those other situations. Defendants' concerns are legitimate. However, the potential confusion and prejudice can be controlled by limiting the evidence and questioning regarding prior taser incidents to a few brief questions. Plaintiff may ask defendants how many times or how frequently they have used a taser and under what kinds of circumstances. In addition, plaintiff may ask defendants whether they have used a taser on an inmate or offender who was handcuffed or otherwise restrained and to briefly describe the circumstances of those particular situations only. I will not permit this line of questioning to lead to mini-trials regarding defendants' use of tasers in other incidents. With this caveat, I am denying defendants' motion.

8. Motion to preclude plaintiff from introducing evidence relating to prior discipline imposed on defendants by the Monroe County Sheriff's Department

Defendants Controy, Blanton and Degner have each been disciplined in the past by the Monroe County Sheriff's Department. Defendants have moved to preclude plaintiff from introducing evidence regarding this prior discipline, arguing that it is irrelevant, unduly prejudicial and improper character evidence.

Plaintiff states that he does not intend to introduce evidence regarding Conroy's or Blanton's disciplinary record. However, plaintiff argues that he should be able to introduce evidence that defendant Degner was disciplined by the Monroe County Sheriff's Department for (1) using sick leave for an absence when he was actually working for an outside private

employer without permission and (2) writing checks on a bank account with insufficient funds.

I am granting defendants' motion to preclude this evidence. Under Rule 608(b), courts may allow counsel to inquire about specific instances of a witness's conduct if they are "probative of the character for truthfulness or untruthfulness" of the witness. However, it is not clear from the facts in the record that the prior instances involving defendant Degner are particularly probative of his honesty or dishonesty. Degner contends that he was not dishonest with the Sheriff's Department regarding the missed shift because he was actually injured when he used the sick leave. With respect to the bad checks, he contends that he had a misunderstanding with his wife about how much money was in his bank account and that, as soon as he discovered the problem, he rectified it immediately with the recipients of the bad checks. To the extent there is any probative value to these instances of prior misconduct, the probative value is outweighed by the risk that the evidence would waste the time of the jury, confuse the issues and unfairly prejudice defendant Degner. Thus, I will preclude it.

9. Motion to preclude plaintiff from presenting any evidence that defendants may be covered by insurance in this case

Defendants are covered by Monroe County's insurance policy with Wisconsin County Mutual Insurance Company, subject to any terms, conditions and exclusions of the policy. Defendants have moved to preclude plaintiff from presenting any evidence of the insurance coverage to the jury.

I am granting this motion. The evidence is irrelevant. Under Fed. R. Civ. P. 411, "[e]vidence that

a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully." Neither side should make any reference to defendants' ability to pay damages or to what entity will ultimately pay damages.

ORDER

IT IS ORDERED that

1. Plaintiff Michael Kingsley's motions in limine, dkt. #96, are GRANTED IN PART and DENIED IN PART as follows:

a. The motion to exclude evidence of criminal convictions barred by Fed. R. Evid. 609 is GRANTED.

b. The motion to exclude collateral details of any admissible convictions is GRANTED.

c. The motion to exclude evidence of other acts, discipline, grievances, lawsuits and threats is GRANTED, with the exception that defendants may introduce evidence, if such evidence exists, that they were aware that plaintiff had a history of assaultive or threatening behavior towards jail staff.

d. The motion to exclude undisclosed expert testimony is DENIED as unnecessary.

e. The motion to permit plaintiff to appear at trial in street clothes and without restraints is GRANTED.

2. The motions in limine filed by defendants Robert Conroy, Stan Hendrickson, Fritz Degner and Karl Blanton, dkt. #89, are GRANTED IN PART and DENIED IN PART as follows:

a. The motion to exclude testimony from plaintiff's expert Brian Landers is DENIED, with the exception that Landers may not give an opinion about plaintiff's

credibility, may not offer an interpretation of Wis. Admin. Code § DOC § 350.14 and may not make legal conclusions.

b. The motion to preclude plaintiff from introducing evidence that he was improperly handcuffed is DENIED.

c. The motion to preclude plaintiff from introducing evidence relating to his carpal tunnel syndrome in the damages phase of trial is GRANTED.

d. The motion to preclude plaintiff from arguing at trial that the taser was excessive because it failed to gain his compliance is DENIED.

e. The motion to permit defendants to impeach plaintiff with evidence of his prior criminal convictions under Fed. R. Evid. 609 is GRANTED IN PART and DENIED IN PART. Defendants may ask plaintiff whether he has been convicted of a felony in the past 10 years, but they cannot ask plaintiff (or any other witness) to describe the nature or number of those convictions.

f. The motion to preclude defendants from introducing evidence regarding the fact that plaintiff was referred to the Monroe County District Attorney's Office for criminal charges relating to the incident in question and the results of the referral is GRANTED.

g. The motion to preclude plaintiff from introducing evidence relating to other instances in which defendants or other Monroe County Sheriff's Department employees have used a taser is GRANTED IN PART and DENIED IN PART. Plaintiff may introduce evidence regarding prior taser incidents for the purpose of showing the reasonableness and motivations of defendants' actions

toward plaintiff, but may not introduce prior taser incidents for the purpose of arguing that defendants acted in accordance with their prior behavior.

h. The motion to preclude plaintiff from introducing evidence relating to prior discipline imposed on defendants by the Monroe County Sheriff's Department is GRANTED.

i. The motion to preclude plaintiff from presenting any evidence that defendants may be covered by insurance in this case is GRANTED.

Entered this 28th day of September, 2012.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge

[Filed: 02/13/13]

II. POST-TRIAL INSTRUCTIONS

Introduction

Ladies and Gentlemen of the Jury:

Now that you have heard the evidence and the arguments, I will give you the instructions that will govern your deliberations in the jury room. It is my job to decide what rules of law apply to the case and to explain those rules to you. It is your job to follow the rules, even if you disagree with them or don't understand the reasons for them. You must follow *all* of the rules; you may not follow some and ignore others.

The decision you reach in the jury room must be unanimous. In other words, you must all agree on the answer to each question.

Your deliberations will be secret. You will never have to explain your verdict to anyone.

If you have formed any idea that I have an opinion about how the case should be decided, disregard that idea. It is your job, not mine, to decide the facts of this case.

The case will be submitted to you in the form of a special verdict consisting of 4 questions. In answering the questions, you should consider only the evidence that has been received at this trial. Do not concern yourselves with whether your answers will be favorable to one side or another, or with what the final result of this lawsuit may be.

Note that certain questions in the verdict are to be answered only if you answer a preceding question in a certain manner. Read the introductory portion of each

question very carefully before you undertake to answer it. Do not answer questions needlessly.

Burden of Proof

When a party has the burden to prove any matter by a preponderance of the evidence, it means that you must be persuaded by the testimony and exhibits that the matter sought to be proved is more probably true than not true. On the liability questions in the special verdict, the burden of proof is on the party contending that the answer to a question should be "yes." You should base your decision on all of the evidence, regardless which party presented it.

Answers Not Based on Guesswork

If, after you have discussed the testimony and all other evidence that bears upon a particular question, you find that the evidence is so uncertain or inadequate that you have to guess what the answer should be, then the party having the burden of proof as to that question has not met the required burden of proof. Your answers are not to be based on guesswork or speculation. They are to be based upon credible evidence from which you can find the existence of the facts that the party must prove in order to satisfy the burden of proof on the question under consideration. In determining whether any fact has been proved, you should consider all of the evidence bearing on the question regardless who introduced it.

Number of Witnesses

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a large number. You need not accept the testimony of the larger number of witnesses.

All Persons Equal Before the Law

This case should be considered and decided by you as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons stand equal before the law and are to be treated as equals.

Impeachment by Conviction of Crime

You have heard evidence that plaintiff Michael Kingsley has been convicted of crimes. You may use that evidence to help you decide whether plaintiff's testimony is truthful and how much weight to give his testimony. You may not consider this evidence for any other purpose.

Multiple Defendants

You must give separate consideration to each claim and each party in this case. Although there are four defendants, it does not follow that if one is liable, any of the others is also liable. In considering a claim against a defendant, you must not consider evidence admitted only against other defendants.

Special Verdict Questions

Plaintiff alleges that defendants used excessive force against him.

Question No. 1 asks whether on May 21, 2010, any or all defendants used excessive force against plaintiff.

Excessive force means force applied recklessly that is unreasonable in light of the facts and circumstances of the time. Thus, to succeed on his claim of excessive use of force, plaintiff must prove each of the following factors by a preponderance of the evidence:

(1) Defendants used force on plaintiff;

(2) Defendants' use of force was unreasonable in light of the facts and circumstances of the time;

(3) Defendants knew that using force presented a risk of harm to plaintiff but they proceeded to act in disregard of plaintiff's safety and failed to take adequate steps to minimize the harm or risk of harm to plaintiff; and

(4) Defendants' conduct caused harm to plaintiff.

In deciding whether one or more defendants used "unreasonable" force against plaintiff, you must consider whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances that defendants faced. You must make this decision based on what defendants knew at the time of the incident, not based on what you know now.

Also, in deciding whether one or more defendants used unreasonable force and acted with reckless disregard of plaintiff's rights, you may consider such factors as:

- The need to use force;
- The relationship between the need to use force and the amount of force used;
- The extent of plaintiff's injury;
- Whether defendants reasonably believed there was a threat to the safety of staff or prisoners; and
- Any efforts made by defendants to limit the amount of force used.

If you find that plaintiff has proved each element of his excessive force claim by a preponderance of the evidence with respect to one or more defendant, you

should answer "Yes" in the appropriate space in Question No. 1. Then proceed to Question No. 2.

If, on the other hand, you find that plaintiff has failed to prove any element of his excessive force claim by a preponderance of the evidence with respect to one or more defendants, you should answer "No" in the appropriate space in Question No. 1. If you answer "No" as to all defendants in Question No. 1, you should not consider any more questions.

Damages Questions

Questions Numbers 2, 3 and 4 involve the issue of damages. If you answer "Yes" to Question No. 1 for one or more defendants, then you must answer Question No. 2 and Question No. 3 for those defendants.

Compensatory damages

Question No. 2 asks what amount of money, if any, will fully and fairly compensate plaintiff for the harm caused by defendants. These are called "compensatory damages."

Plaintiff has the burden of convincing you, by the preponderance of the evidence, both that he has been injured or damaged and the amount of the damages. This does not mean, however, that plaintiff must produce evidence that is as exact as the evidence needed to support findings on other questions in the verdict. Determining damages involves the consideration of many different factors that cannot be measured precisely. In determining the damages you must base your answer on evidence that reasonably supports your determination of damages under all of the circumstances of the case.

Compensatory damages are not restricted to the actual loss of money; they include both the physical

and mental aspects of injury, even if these are not easy to measure. You should consider the physical, mental and emotional pain and suffering that plaintiff has experienced.

Do not measure damages by what the lawyers ask for in their arguments. Their opinions as to what damages should be awarded should not influence you unless their opinions are supported by the evidence. It is your job to determine the amount of the damages sustained from the evidence you have seen and heard. Examine that evidence carefully and impartially. Do not add to the damage award or subtract anything from it because of sympathy to one side or because of hostility to one side. Do not make any deductions because of a doubt, in your minds about the liability of any of the parties.

Income Taxes

You must not add to any award of damages any money to compensate the plaintiff for state or federal income taxes. Damages received as an award for personal injuries are exempt from income taxes. On the other hand, you must not subtract any money from your award of damages just because the plaintiff is not required to pay income taxes.

Punitive Damages

Question No. 3 asks whether one or more defendants acted in a way that demonstrated a willful or reckless disregard for plaintiff's rights. If you answered "yes" to Question No. 4 with respect to either or both defendants, you may award punitive damages in *Question No. 4* against those defendants.

Punitive damages are never a matter of right. This means that you are not required to make any award of

punitive damages, but you may do so if you think it is proper under the circumstances. It is in the jury's discretion to award or withhold them.

Punitive damages may be awarded even if the violation of plaintiff's rights resulted in only nominal compensatory damages. That is, you may award punitive damages even if the plaintiff can show no damages or other injury as a result of defendants' actions.

The purposes of punitive damages are to punish the defendants for their conduct and to serve as an example or warning to the defendants and others not to engage in similar conduct in the future. Plaintiff must prove by a preponderance of the evidence that punitive damages should be assessed against defendants.

You may assess punitive damages only if you find that the conduct of at least one of the defendants was in reckless disregard of plaintiff's rights. An action is in reckless disregard of plaintiff's rights if under the circumstances, it reflects complete indifference to plaintiff's safety or rights. If you find that a defendant's conduct was motivated by evil motive or intent, such as ill will or spite or grudge either toward plaintiff individually or toward all persons such as plaintiff, then you may find that the defendant deliberately violated the plaintiff's rights. In addition, if the defendant was in a position in which he certainly should have known that his conduct would violate the plaintiff's rights, and proceeded to act in disregard of that knowledge and of the harm or the risk of harm that would result to the plaintiff, then that defendant acted with reckless disregard for the plaintiff's rights.

If you find that punitive damages are appropriate, then you must use sound reason in setting the amount of those damages. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes that I have described to you, but should not reflect bias, prejudice, or sympathy toward any party. In determining the amount of any punitive damages, you should consider the following factors:

- the reprehensibility of defendants' conduct;
- the impact of defendants' conduct on plaintiff;
- the relationship between the plaintiff and defendants;
- the likelihood that defendants would repeat the conduct if an award of punitive damages is not made; and
- the relationship of any award of punitive damages to the amount of actual harm the plaintiff suffered.

Selection of Presiding Juror; Communication with the Judge; Verdict

When you go to the jury room to begin considering the evidence in this case you should first select one of the members of the jury to act as your presiding juror. This person will help to guide your discussions in the jury room.

You are free to deliberate in any way you decide or select whomever you like as a presiding juror. When thinking about who should be presiding juror, you may want to consider the role that the presiding juror usually plays. He or she serves as the chairperson during the deliberations and has the responsibility of insuring that all jurors who desire to speak have a chance to do so before any vote. The presiding juror

should guide the discussion and encourage all jurors to participate. I encourage you at all times to keep an open mind if you ever disagree or come to conclusions that are different from those of your fellow jurors. Listening carefully and thinking about the other juror's point of view may help you understand that juror's position better or give you a better way to explain why you think your position is correct.

Once you are in the jury room, if you need to communicate with me, the presiding juror will send a written message to me. However, don't tell me how you stand as to your verdict.

As I have mentioned before, the decision you reach must be unanimous; you must all agree.

When you have reached a decision, the presiding juror will sign the verdict form, put a date on it, and all of you will return with the verdict into the courtroom.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed: 10/03/12]

10-cv-832-bbc

MICHAEL KINGSLEY,

Plaintiff,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Defendants.

PRETRIAL CONFERENCE ORDER

A final pretrial conference was held in this case on October 2, 2012, before United States District Judge Barbara B. Crabb. Plaintiff appeared by Edward Pardon, Wendy Ward and Joel Graham. Defendants appeared by Andrew Jones and Timothy Posnanski.

Counsel predicted that the case would take 3 days to try. They understand that trial days will begin at 9:00 and will run until 5:30, with at least an hour for lunch, a short break in the morning and another in the afternoon. The jury will be selected on Tuesday, October 9, 2012 by United States Magistrate Judge Stephen Crocker.

Counsel agreed to the voir dire questions in the form distributed to them at the conference and to adding four witnesses (Robert Conroy, Karl Blanton, Nicholas Manka and John Peters) to the list of prospective

witnesses included in the voir dire. The jury will consist of eight jurors to be selected from a qualified panel of fourteen. Each side will exercise three peremptory challenges against the panel. After the jury is selected, the magistrate judge will read the introductory instructions to the jury.

Counsel agreed that with the exception of experts, all witnesses would be sequestered. Counsel are either familiar with the court's visual presentation system or will make arrangements with the clerk for instruction on the system.

No later than noon on October 12, 2012, plaintiff's counsel will advise defendants' counsel of the witnesses plaintiff will be calling on Monday and the order in which they will be called. Counsel should give similar advice at the end of each trial day; defendants' counsel shall have the same responsibility in advance of defendants' case. Also, no later than noon on October 12, counsel shall meet to agree on any exhibits that either side wishes to use in opening statements. Any disputes over the use of exhibits are to be raised with the court before the start of opening statements.

Counsel should use the microphones at all times and address the bench with all objections. If counsel need to consult with one another, they should ask for permission to do so. Only the lawyer questioning a particular witness may raise objections to questions put to the witness by the opposing party and argue the objection at any bench conference.

Counsel are to provide copies of documentary evidence to the court before the start of the first day of trial.

Counsel discussed the form of the verdict and the instructions. Final decisions on the instructions and form of verdict will be made at the instruction conference at the close of evidence.

The parties have stipulated to the dismissal of plaintiff's state law claim for assault and battery and plaintiff's § 1983 claims against Robert Conroy and Karl Blanton and the removal of defendant Lisa Josvai and Patricia Fish from the suit and the court has signed an order to that effect. The voir dire, verdict form and instructions have been amended to reflect these changes.

Defendants renewed their request to have the jurors informed that Monroe County is not a party to plaintiff's suit. After considering this request again, I am persuaded that doing so is not necessary to protect the county's rights.

Defendants asked for clarification of the discrepancy in the court's order on the motions in limine. The ruling in the "Order" portion at p. 24 stands: defendants may ask plaintiff whether he has a prior conviction; they may not ask him how many prior convictions he has.

Both sides have stated objections to the proposed instruction on excessive force. For now, I am leaving it as is, with the exception of a change to subsection (3). That subsection will read: "Defendants knew that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff's safety by failing to take reasonable measures to minimize the risk of harm.

In addition, I have added an instruction about nominal damages to the instruction on compensatory damages.

Entered this 3d day of October 2012.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

10-CV-832-BBC

MICHAEL KINGSLEY,

Plaintiff,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Defendants.

STENOGRAPHIC TRANSCRIPT OF SECOND DAY OF JURY TRIAL HELD BEFORE THE HONORABLE JUDGE BARBARA B. CRABB

October 15, 2012
9:00 a.m.
Madison, Wisconsin

APPEARANCES:

For the Plaintiff:

Merchant & Gould, P.C.
BY: EDWARD PARDON
WENDY WARD
JOEL GRAHAM
10 East Doty Street, Ste. 600
Madison, Wisconsin 53703

Julie King, Paralegal

For the Defendants: Whyte Hirschboeck Dudek, S.C.
BY: ANDREW JONES
TIMOTHY POSNANSKI
555 East Wells, Ste. 1900
Milwaukee, Wisconsin 53202

* * *

[2-A-43] moved away or do you want to stand there for questioning?

MR. PARDON: I will stand at the lectern.

THE COURT: Okay.

MR. PARDON: Your Honor, we call plaintiff Michael Kingsley.

THE COURT: Please come forward to be sworn.

MICHAEL KINGSLEY, PLAINTIFF, SWORN

THE CLERK: Please have a seat and be sure to speak right into the microphone.

DIRECT EXAMINATION

BY MR. PARDON:

Q Good morning.

A Good morning.

Q Could you please state your name?

A My name is Michael Brandon Kingsley.

Q And, Mr. Kingsley, could you tell us briefly a little bit about yourself?

A Yes. I'm 31 years old. I was born and raised here in Madison, Wisconsin. I'm not married. I have no children. I attended and graduated from Madison East High School. I've held several jobs. More recently I worked as an auto detailer and a car salesman. And I

eventually got into trouble with the law and I got—currently I'm serving a three-year sentence at this time for a drug crime. And I don't know, I'm currently [2-A-44] incarcerated at this time.

Q Okay. When are you scheduled to be released?

A I currently have a little less than two years left to do.

Q Okay. What are you planning on doing when you get out?

A Basically just take it one day at a time. And first I want to try to help my mom out as much as I can. She just recently got diagnosed with --

MR. JONES: Objection. Relevance.

THE COURT: Sustained.

BY MR. PARDON:

Q All right. Have you completed drug rehab?

A I'm currently in two treatment programs at the Wisconsin Resource Center. I'm currently on a waiting list to attend SGIP, which is errors in thinking. And I'm, yeah, I'm just on the waiting list for right now.

Q Okay. While you were awaiting trial for the offense for which you are now incarcerated, where did you reside?

A I was in Monroe County Jail.

Q Okay. I would like to direct your attention to the incident that this lawsuit is about. Did something happen at about ten o'clock on the evening of May 20 that started sort of the events we're talking about today?

A Yes.

[2-A-45] Q Can you describe what happened?

A It was about ten or 10:30 at night. Deputy Manka was performing lockdown of the jail. And he walked past my room that I was in and he noticed there was a paper on a light and he told me to take it off. And I told him I wasn't going to take it off because I didn't put it there. He soon left.

After he came back during his next round, I believe he told me I needed to take the paper off again. I explained to him I didn't put it there again. And he said that he was going to issue me a violation report. And at that time I made a sarcastic remark saying, sounded like a job for the CERT team to come take the paper off the light. And he didn't say anything and he just left after that. Nothing ever happened after that.

Q What is your understanding of what the CERT team—

A It's something like the SWAT team or something, come and have, like, shields, batons, helmets on I guess.

Q Did you get along with Deputy Manka?

A Yes, I did.

Q Did you put the paper over the light?

A No. The paper was there ever since I was in that cell. I was in there for over a month or a month at that time. It was there the whole entire time.

Q Based on your experience being in the Monroe County [2-A-46] Jail, do you know whether inmates sometimes put paper over the light?

A From my conversations with other jail staff members, they said it happens all the time. And like I say, sometimes I think it gets overlooked.

Q During your conversation—your two conversations with Deputy Manka that night or that evening, did you make any threats to him?

A Not at all, no.

Q And did you tell Deputy Manka that if someone came in to take off the paper, you would resist them?

A No, I did not.

Q Did the paper—what happened with the paper that night?

A The paper—paper just stayed on the light like it had been the whole time.

Q What happened the next morning?

A The next morning Sergeant Hendrickson came and asked me if I wanted my medication and I told him I didn't want to take my medication. And he asked me, did I take the paper off the light. I told him again that the paper has been there for I don't know how long. And he said—he repeated again and I think he said, "It's a direct order. I'm telling you to take the paper off the light."

And I didn't respond to him after that. I didn't [2-A-47] want to try to get into an argument with him. So after that, he just left after. I didn't respond to him after he kept on telling me to take the paper off.

Q Okay. Did you make any threats to Sergeant Hendrickson during this conversation or either of them?

A Not at all, no.

Q Did you tell Sergeant Hendrickson, if someone came in to take off the paper that you would resist them?

A No, I didn't.

Q What happened after that?

A After that Lieutenant Conroy came in and he asked me to take the paper off the light. And I told him, you know, the paper had been there for a long time. I don't even know how long it was there. I know it was there the whole time I was in the cell. And I basically told him he was probably in a better position to take the paper off the light because the paper—or the light is, like, in the middle of the cell. And he told me that he would take it off, but since he was taking it off that I would have to go to receiving.

Q What's your understanding or what, as of the time, was your understanding of receiving?

A Receiving is like the *hole* or segregation. You know, it's basically they call it the *hole* because there's a hole in the door. It's basically for [2-A-48] punishment.

Q Okay. Did you make any threats toward Lieutenant Conroy when you spoke with him?

A No, I did not.

Q Did you tell Lieutenant Conroy, if anyone came in to take down the paper you would resist him?

A No. I didn't say anything to him.

Q And would it have been easy for you to take the paper down?

A No. Like I said, the light is in the middle of the cell. And the bed is off attached to the wall, so I would have to, like, get on the bed and then try to jump off and try to simultaneously grab the paper off the light. I figure I'm not going to do that. I'm not saying it's

impossible, I could do it, but I just didn't feel comfortable doing it.

Q What happened after Lieutenant Conroy left after your conversation with him?

A After he left he came back with four other officers: Officer Blanton, Degner, Sergeant Hendrickson and Deputy Shisler, I believe—

Q Okay.

A —I think his name is.

Q And what happened in your interaction with these officers then?

[2-A-49] A Sergeant Hendrickson came up to the cell door and he told me to get up off the bed and put my hands behind my back. And at that time I looked up and I see Deputy Degner. He had, like, a taser. And the taser has, like, a light or a beam on it. And I was, like, woe, you know. I didn't—I was, like, I thought just lay there, don't make any sudden moves because I believe they would have probably tried to justify me getting up or anything like that and they would have tased me.

I figured I didn't do anything wrong. Why do I have to go to the hole? They told me for disobeying orders. And I heard Lieutenant Conroy, I believe he said, "Just put your hands behind your back," so at that time I put my hands behind my back. And I think they made a signal or something and they opened up the door.

Q Okay. When Lieutenant Conroy told you to put your hands behind your back, where were you physically?

A I was laying on the bed facedown.

Q Okay. And then so at that point then what happened?

A They opened up the cell door and Sergeant Hendrickson and Deputy Blanton and Deputy Degner, they entered the cell. And Sergeant Hendrickson, he put his knee into my back and put the handcuffs on extremely tight. And Deputy Blanton, I believe he was holding down or pinning down my legs.

[2-A-50] And they told me to get up. And I don't know, it was kind of hard. I was lying facedown. I had my handcuffs on behind by back. And I told them I couldn't get up, it was kind of hard. And they seemed like they was kind of irritated about it.

And they, in a pulling and dragging motion, they dragged me off the bed. And when they were doing so, my feet slapped—the bed has got a frame on it and my feet slapped the bed frame. And it caused instant pain in my feet and more in my right foot than my left foot.

And I went down to my knees complaining of my foot. And they told me to get up. And I told them I couldn't get up. And I just kept complaining about my foot. And they said, "Get up or we're going to drag you." And I said I couldn't, my foot. I kept complaining about my foot; I remember that. And at that time they just—they drug me out of the cell block.

Q Okay. I'm going to stop you right there and I want to follow up on some other things you said.

A Okay.

Q When the cuffs were placed on you, did you resist Sergeant Hendrickson putting the cuffs on?

A No, I did not.

Q And did you make any threats to any of the deputies while they were putting the cuffs on?

[2-A-51] A No.

Q And then after they sort of picked you up and started to drag you, did you make any threats to anyone while they were doing that?

A Absolutely not.

Q Well, then what happened after that?

A They took me to the—through the cell block and then they have, like, a hallway. And they set me down and then they, the four of them, instead of two, each one grabbed one of my arms and legs and they carried me to the segregation cell.

Q While they were carrying you to the segregation cell, did you make any threats toward anyone?

A No, I did not.

Q Do you have any idea about how long it was or how far it was that they—that they carried you from your cell to the receiving cell?

A I don't know exactly, but maybe 75, 50 feet maybe.

Q What then happened after the officers took you into the receiving cell?

A After they took me into the receiving cell, Sergeant Hendrickson—they laid me down on the bed facedown—Sergeant Hendrickson put his knee into my back, which was pretty painful. And Deputy Blanton was attempting to try to take the handcuffs off. And when he was doing so, he [2-A-52] made the handcuffs even tighter than they were, which was causing me pain and to, like, tense up.

And they kept yelling at me telling to relax, relax. And I was in so much pain, I was groaning and grunting. And then I heard Deputy—Sergeant Hendrickson—it's kind of hard to remember because I hadn't seen the video until, I don't know, like over a year and a half or something like that.

Q Mm-mm.

A And—

Q I want you to talk about what you remember and don't worry about the video today.

A Okay. Sergeant Hendrickson put his knee in my back and they were trying to make the hand—take the handcuffs off and they made them tighter. And I tried—you know, I felt like I was suffocating or it was hard for me to breathe because they had their, like, knee on my back.

And I went to, like, move my head up and, you know, that's when Sergeant Hendrickson slammed my head down and it caused me some pain. And at that time I heard him say, "Tase his ass," and I was shot with the taser in my back, which was extremely painful.

And then I—I think they left, you know. I think I fainted or I don't know if I blacked out or what. I [2-A-53] was in so much emotion and it was kind of hard to just—maybe I was having a panic attack, I don't know. It was just too much for me to deal with and it's kind of hard to remember certain things of what happened.

Q All right. Prior to the time that you heard Sergeant Hendrickson tell somebody to tase you, were you at all told that you might be tased or warned that you might be tased?

A No, not at all.

Q What did it feel like to be tased?

A I don't know. It's extremely painful. I have had my fair share of injuries and been subject to different types of pains, but I could personally tell you that being shot with a taser gun is extremely painful. It's hard to explain. You can feel electricity come through your body and exit at the bottom of your feet. And it's such serious pain that, you know, I hope no one ever has to experience it because there's no—you'll never forget that type of pain ever.

Q Okay. During any of the time that you were in the receiving cell did you threaten any of the officers?

A No, I did not.

Q Did you resist their efforts to take off your handcuffs?

A No, I did not.

[2-A-54] Q Okay. You indicated at one point that you may have raised your head or raised up. Did you attempt at any time to do anything like bite any of the officers or anything like that?

A Absolutely not, no.

Q Now, did you read any reports of this incident later?

A Yes, I did.

Q And did you read anything about biting or anything like that?

A Yeah. I had read—

MR. JONES: Objection, Your Honor.

THE COURT: Sustained.

BY MR. PARDON:

Q All right. I will go on. Do you recall whether you were asked sometime afterwards if you wanted to see the nurse?

A Yeah. The nurse came to my cell and asked me some questions. I don't remember what she asked me, but I was pretty much—I was just irritated with everybody, what just happened to me, and I didn't want to talk to anybody.

Q Okay. What did your hands look like after they removed the handcuffs?

A I remember you could see, like, the indentations.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

10-CV-832-BBC

MICHAEL KINGSLEY,

Plaintiff,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Defendants.

STENOGRAPHIC TRANSCRIPT OF SECOND DAY OF JURY TRIAL HELD BEFORE THE HONORABLE JUDGE BARBARA B. CRABB

October 15, 2012
9:00 a.m.
Madison, Wisconsin

APPEARANCES:

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Merchant & Gould, P.C.
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JOEL GRAHAM
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Julie King, Paralegal

For the Defendants: Whyte Hirschboeck Dudek, S.C.
BY: ANDREW JONES
TIMOTHY POSNANSKI
555 East Wells, Ste. 1900
Milwaukee, Wisconsin 53202

* * *

[2-A-88] sure to speak right into the microphone.

ADVERSE EXAMINATION

BY MR. PARDON:

Q Good morning, Lieutenant Conroy.

A Good morning.

Q Obvious question, but could you state your name, please?

A Robert Conroy.

MR. PARDON: All right. I apologize, Your Honor. I request permission to proceed with an adverse examination.

THE COURT: Any objection?

MR. JONES: No, Your Honor.

THE COURT: You may proceed.

MR. PARDON: Thank you.

BY MR. PARDON:

Q Lieutenant Conroy, you're presently a patrol operations lieutenant for Monroe County; isn't that correct?

A Correct.

Q All right. And you've held that position since March of 2011, right?

A Right around there, yes, correct.

Q And prior to that time you were a jail administrator for Monroe County, right?

* * *

[2-A-97] complained about his foot hurting, right?

A Yes.

Q And so he was then carried into the hallway by Sergeant Hendrickson and Deputy Blanton, correct?

A Yes.

Q Carried or dragged, depending on what you hear, right?

A Carried.

Q All right. And after he was brought out into the hallway, you talked to him a little bit, didn't you?

A Correct.

Q All right. And during the time that you were talking to him, he didn't make any threats to you or to any of the other deputies, correct?

A No, he didn't.

Q And so a group of you then carried him down to the receiving cell, right?

A Correct.

Q All right. And I think it's your estimate that the distance he was carried from his cell down to the receiving cell was approximately a hundred feet?

A Yes. That was my estimate.

Q Okay. And during the time he was being carried, Mr. Kingsley did not make any threats to harm anyone; isn't that correct?

[2-A-98] A Correct.

Q And during the time he was carried, Mr. Kingsley did not exhibit any active resistance, as far as you know; isn't that correct?

A He showed resistance, but active, no.

Q Okay. And after Mr. Kingsley was carried to the receiving cell, he was placed facedown on the concrete bunk with his head away from the door, right?

A Correct.

Q All right. And just to be clear so the jury kind of has an idea, in the receiving cell there's the doorway, kind of the entryway, and then the concrete bunk is on the left as you walk into the cell, right?

A Correct.

Q Okay. And basically after you helped carry him in, you then sort of walked and stood outside the cell, right?

A Correct.

Q All right. And that left Sergeant Hendrickson and Deputy Degner still in the cell along with Sergeant Shisler and Deputy Blanton, right?

A Correct.

Q Okay. And in terms of where the deputies were, Deputy Blanton eventually sort of assumed the role of removing the cuffs. He was sort of in the middle of [2-A-99] Mr. Kingsley; isn't that right?

A Yes.

Q And Sergeant Shisler was sort of at Mr. Kingsley's legs, right?

A Yes.

Q And Sergeant Hendrickson was sort of at his torso and his head, right?

A Yes.

Q So they are all to the right of him, just to be clear, right?

A They were all on his right side, yes.

Q And Deputy Degner was sort of standing behind him for a while and at one point he moved to Mr. Kingsley's shoulder area between Dr. Blanton and Sergeant Hendrickson, right?

A Correct.

Q And you were outside, again, just to be clear?

A Just outside, yes.

Q And if you looked in, you could see some of what was going on in the receiving cell, but some of it was blocked by the deputies, right?

A Yes.

Q All right. And you don't recall, for example, whether you see—saw, like, Mr. Kingsley's feet moving around, right?

[2-A-100] A I don't recall his feet moving around, no.

Q And you believe you saw some movement of Mr. Kingsley. It was mostly he moved his upper body some of the time, right?

A Movements in his upper body, yes.

Q He wasn't moving his upper body the entire time, right?

A Not the entire time, no.

Q And you kind of heard some moaning and growing from Mr. Kingsley, right?

A Yes.

Q All right. And you heard him say, "Leave the handcuffs on and get the 'f' out," right?

A Yes.

Q All right. And you personally didn't see any resistive tension in Mr. Kingsley's arms, right?

A Inside the cell?

Q Inside the receiving cell, correct.

A Not while he was inside the cell no.

Q Okay. You didn't hear Mr. Kingsley make any physical threats to harm any of the deputies while he was inside the receiving cell, did you?

A I did not.

Q All right. You did not see Mr. Kingsley attempt to bite anyone, did you?

[2-A-101] A I did not.

Q You didn't hear anything from any of the deputies that suggested Mr. Kingsley was attempting to bite anyone, did you?

A While inside the receiving cell?

Q While inside the receiving cell.

A No, I did not.

Q Thank you. All right. And I would like to ask you about the use of the taser. You didn't hear anyone threaten to use the taser before it was used, did you?

A No.

Q Okay. And as far as you can remember, you didn't actually see Deputy Degner deploy the taser at the time it was deployed; isn't that correct?

A I saw him move in, but I couldn't see it deployed though.

Q You don't actually even remember hearing the taser being deployed, correct?

A Correct.

Q And in fact you didn't recognize that the taser had been applied until probably a few seconds after that; isn't that correct?

A Correct.

Q All right. And at the time the taser was used, you didn't know why they chose to use it; isn't that right?

[2-A-102] A Correct.

Q All right. In fact I think you said something about that when you wrote an incident report about it as well, didn't you?

A Yes.

Q Okay. And just to be clear, from your personal experience, if Deputy Degner had disagreed with an instruction from Sergeant Hendrickson to use the taser, it would have been his obligation not to use the taser; is that correct?

A Correct.

Q All right. And that's because if one officer tells another officer to use force, the person who is actually applying the force is still responsible for making their own decisions, aren't they?

A It's your obligation to not follow through with that or if you see somebody, yes, officer override, that's correct.

Q All right. At this time I would like to introduce Plaintiff's Exhibit 13, which is a collection of some videos. And it's my understanding, Your Honor, we have a stipulation that this can be admitted into evidence.

MR. JONES: That's correct. No objection.

THE COURT: All right.

MR. PARDON: Could you turn on the laptop here?

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed: 11/05/12]

10-CV-832-BBC

MICHAEL KINGSLEY,

Plaintiff,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Defendants.

STENOGRAPHIC TRANSCRIPT OF SECOND DAY OF JURY TRIAL AFTERNOON SESSION HELD BEFORE DISTRICT JUDGE BARBARA B. CRABB, and a jury

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October 15, 2012
1:14 p.m.
Madison, Wisconsin

APPEARANCES:

For the Plaintiff:

Merchant & Gould
BY: EDWARD PARDON
WENDY WARD
JOEL GRAHAM
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For the Defendants: Whyte Hirschboeck Dudek
BY: ANDREW JONES
TIMOTHY POSNANSKI
One East Main Street
Madison, Wisconsin 53703

* * *

[2-P-51] Q Was there any discipline to be imposed other than these lockdowns and the segregation in the receiving cell? Or was that it?

A No other discipline, just a lockdown.

MR. JONES: Thank you.

THE COURT: You may step down.

(Witness excused at 2:21 p.m.)

THE COURT: Mr. Pardon, you may call your next witness.

MR. PARDON: All right. Your Honor –

MR. JONES: I'm sorry, I didn't mean to interrupt, but this witness was under subpoena. Is he released from that subpoena?

MR. PARDON: Yes.

THE COURT: You're free to leave the building.

MR. PARDON: Your Honor, we call Mr. Brian Landers.

BRIAN LANDERS, PLAINTIFF'S WITNESS, SWORN,

DIRECT EXAMINATION

BY MR. PARDON:

Q Good afternoon.

A Good afternoon.

Q Could you state your name.

A Brian Landers.

Q Mr. Landers, what is your present employment [2-P-52] position?

A I am the criminal justice chair for Madison College.

Q And Madison College, just for the benefit of our jury, has that been referred to as any other names?

A Yes. Madison Area Technical College.

Q MATC?

A MATC, correct.

Q Do you have any other positions that you presently hold?

A I co-own a company called *BlueboardIT*, and I'm also an elected official. I'm the mayor of the City of Wisconsin Dells.

Q Could you briefly describe your educational background.

A I have a social degree studies from MATC. I also have a bachelor of science in criminal justice and prelaw from Mt. Senario College. And I also attended the 500—or the 400-hour at that time Basic Law Enforcement Recruit Academy at MATC.

Q All right. And do you have any direct experience in law enforcement?

A Yes. I served 18 years with the Wisconsin Dells Police Department.

Q And when was that?

[2-P-53] A From 1992 to the end of 2010.

Q Okay. And what in general were your duties as a police officer?

A General patrol duties. Investigative duties. As I advanced through the Department, I became a canine handler for about eight-and-a-half years. I was on the drug unit. I was assigned to the county drug units as well in Sauk and Columbia County. I was in charge of Department training.

I was promoted to Lieutenant in 2003 through 2008. In 2008 I was promoted to Lieutenant. Part of my duties as a sergeant were supervision of patrol staff, supervision of nonpatrol staff, as well our dispatch. Part of my duties as Lieutenant was to do policy guidance, assessment budgeting.

We also had a municipal lockup, so duties included administration of the municipal lockup as well.

Q Just to clarify I think you said you became a Lieutenant in 2003.

A I'm sorry. Sergeant. I was promoted to Sergeant from 2003 to 2005 or 2003 to 2008 and then 2008 I was promoted to Lieutenant.

Q Okay. And did part of your training as a police officer involve the appropriate use of force?

A Yes, it did.

[2-P-54] Q Did you ever have occasion to use force or consider the use of force while you were a police officer?

A Many times.

Q Did you ever have occasion to use a taser on anyone while you were a police officer?

A Yes, I did.

Q And have you ever yourself been tased?

A Yes, I have.

Q What does it feel like?

A It hurts.

Q And as part of your duties in the Wisconsin Dells Police Department, did you have occasion to have access to a jail?

A Yes. The City of Wisconsin Dells actually sits on four different counties: Sauk, Columbia, Juneau and Adams. So we had to be familiar with the jail procedures in all four of those jails. That included taking people to the jail; sometimes we'd have to pick them up to transport them to other places; sometimes we'd have to interview people at the jail. So we had to be familiar with those jails, as well as our municipal lockup as well.

Q Okay. Now, you mentioned that you're on the faculty of Madison College or MATC, formerly known as MATC. How long have you been on the faculty?

[2-P-55] A I was part-time since 2000 and then I was hired full time in December of—actually technically September of 2010.

Q Okay. And what are your present duties at Madison College?

A As criminal justice chair, the bulk of my duties include the administration of The Law Enforcement Academy, The Jail Academy and the specialized training. Specialized training is when a police officer gets done with their basic training, then they go through specialized training to keep up their certifications or to get an advance knowledge or training in a specific skill.

Part—I also teach within the Law Enforcement Academy, and part of my duties when initially hired and still carry with me today is I'm kind of the course coordinator and lead professor of a course called *Introductions to Corrections* which is a course that's trained in the associate degree portion of the Madison Area Technical College.

Q Have you ever heard of something called—that's colloquially called the *DAAT Manual*?

A Yes.

Q What does DAAT stand for?

A DAAT is an acronym. D-A-A-T. It stands for [2-P-56] *Defensive And Arrest Tactics*.

Q Do you do any instruction with respect to the DAAT Manual?

A Yes. I've been a DAAT instructor since 2000. I've been the lead instructor for MATC in their DAAT program since 2003, and was also appointed as a master instructor of defensive tactics.

Q Okay. Just to back up a bit, what professions are you preparing the students that you're teaching at Madison College?

A Wide variety. Our students go on to become police officers, sheriff's deputies, jailers, correctional employees at both the state and federal level, federal law enforcement, probation, courts, sometimes private security.

Q Okay. And how many officers have you personally trained?

A Well over a thousand.

Q Just to help us if there's any—to be clear, are there any differences between corrections officers, jailers, and police officers?

A Yeah. Police officers are officers that work on patrol. They work the street. Jailers are people that work through—usually through a county sheriff's Office that are assigned to work in a jail setting. [2-P-57] Correctional officers are—usually that term is referred to people that work in the profession of corrections at the state or federal level working in prisons.

Q All right. And would a police officer or a sheriff's deputy be qualified to work in a jail, in a county jail?

A They would be qualified. The qualifications are higher for law enforcement than they are for jailers per se; not to say the professionalism should not be equal, but they would be qualified. But if they were going to work as a jailer full time, then they would have to attend and complete the Jail Academy.

Q All right. You talked earlier about the Defensive And Arrest Tactics Manual. Could you describe a little bit more about what that is?

A The Defensive And Arrest Tactics Manual is kind of the guide or the Bible for use of force in Wisconsin. Every single police officer in the State of Wisconsin, when they go through the academy, has to be trained in defense and arrest tactics. The manual is just that. It's the training manual for every single law enforcement officer in Wisconsin.

Q All right. And have you personally played any role in developing the content of the DAAT Manual?

[2-P-58] A Yes, I have.

Q And how so?

A I've been appointed by the—I was a State of Wisconsin, Department of Justice, Division and Training in Standards as a member of the Tactical Advisory Committee. The Tactical Advisory Committee is the committee that shaped law enforcement training, including the authoring, distribution, and regulations of training anything related to defensive and arrest tactics as a statewide curriculum.

Q And as part of your role on the Wisconsin DOJ Tactical Advisory Committee, have you assisted in preparation of other manuals that are used?

A Yes. Under our guidance, not only is DAAT's curriculum part of our program, but the state firearms curriculum; the tactical response curriculum, which would be something like a active shooter or the school shooting; and also the electronic control device training and curriculum.

Q And electronic control device, does that include a TASER?

A Yeah. It's the state's name for a TASER.

Q Okay. Are there differences in the way that law enforcement officers or police officers are trained in use-of-force principles as opposed to the way jail [2-P-59] officers are trained?

A No. There's different topics: Defensive and arrest tactics is meant more for law enforcement training. Jailers have to go through what we call POSC, which is P-O-S-C. It's an acronym for Principles of Subject Control.

Out of the physical requirements, when somebody goes through an academy, they're required to have a physical testing, besides a written exam, but to make

sure that all the competencies, that they know have to do the different skills required. Out of the 50 requirements in POSC, and I believe there's 49 in DAATs, they're almost 99% identical. But the major difference between POSC in jail and DAAT in law enforcement is a lot of the—some of the tactics like group handcuffing or escorting a person from point A to point B. There's more emphasis on doing it as a team or as a group in a jail than there is in DAAT.

The theory is is that a lot of police officers, especially in Wisconsin, work in rural or isolated areas, so there's more of an emphasis on how to take care of yourself when you're on your own.

Q Okay. And you sort of said this, but what's the relationship between POSC and DAAT Manuals?

A The relationship is that there's a separate [2-P-60] committee, the POSC Committee that the state appoints. Back a couple years ago, I want to say somewhere around 2010, they decided to shape their manual in line with the DAAT Manual so that there's almost seamless training between the two.

Q Okay. I'm going to refer you to Plaintiff's Exhibit 1067, if you could find that in your binder, please. Sorry about the bulkiness.

A That's okay. I believe I have it.

Q Okay. Could you describe what Plaintiff's Exhibit 106 is.

A It would be my curriculum vitae or my resume.

Q And does this accurately reflect your employment and educational experience?

A Yes, it does.

MR. PARDON: Your Honor, I move to admit Plaintiff's Exhibit 106.

MR. JONES: No objection.

THE COURT: Received.

MR. PARDON: May I publish it then for the jury?

THE COURT: Any objection?

MR. JONES: No.

THE COURT: You may.

BY MR. PARDON:

[2-P-61] Q All right. I'm going to direct your attention to the second page of your resume. Now again, I have put yellow markings on the copy here that I'm showing the jury and you. I'd like to highlight a couple of things and I'm going to refer to the section on instructor certifications. Can you describe what are instructor certifications?

A These are specific certifications that are provided either through the State of Wisconsin Department of Justice; sometimes there are private entities that will also certify you in certain areas.

Q Okay. And I'd like to call your attention to the second highlighted portion I have there. What's a master instructor of defensive tactics?

A That is somebody that has to be appointed through a technical college or training academy. Actually they're referred to by a technical college or a training academy to the Department of Justice of somebody who has advanced knowledge or training in the use of defensive tactics and the training of defensive tactics to become a trainer.

The Department of Justice Training and Standards then reviews that and if they feel the person is qualified, they will appoint them as a master instructor.

[2-P-62] Q And you have that certification?

A Yes.

Q Okay. And the second highlighted thing I have a few lines down says *report writing instructor*. Do you see that?

A Yes, I do.

Q What certification is that? What's that about?

A That's another—you have to submit kind of an application resume to the Department of Justice, again outlining your training and experience and education, and the training and standards board meets and if they feel that you're qualified to teach this, then you are certified as a report writing instructor.

Q And I'm going to refer you to the final certification I have highlighted. Do you see the one that says *TASER instructor*?

A Yes.

Q And previously what's that?

A That would be a private vendor outside the State of Wisconsin, Taser International, that if you go through their training course, then you are certified as a TASER instructor if you go through the instructor level course.

Q You can set the resume aside here for now. Have you evaluated use-of-force issues before?

[2-P-63] A Yes, I have.

Q All right. Have you ever testified in a case like this before?

A No, I have not.

Q Okay. What were you asked to do in connection with this case, Mr. Landers?

A Give me one second.

Q Okay. I apologize.

A That's okay. Excuse me. I was asked to do—to review this incident and establish an opinion, and I've established an opinion based upon the three incidents. The first incident that I've established an opinion on was that the use of the taser was unreasonable.

The second—

MR. JONES: Objection, Your Honor.

THE COURT: I'm sorry. Did you object?

MR. JONES: I did object. May I approach?

THE COURT: You may.

(Discussion at side bar at 2:35 p.m.)

MR. JONES: This has been covered in part in the motions in limine, but I wanted to renew my objection to the witness testifying about what is reasonable and unreasonable.

THE COURT: What is—

MR. JONES: What is reasonable force or what is [2-P-64] unreasonable force. We think that's essentially a legal conclusion and that he should not be permitted to testify to it. I do have citations if that would assist the Court.

MR. PARDON: I think the answer to your motion in limine, to the motion in limine was an accurate

description of the law. I think he can testify. He's talking about what the standards are, how officers are expected to act, and he's going to testify whether that's reasonable.

THE COURT: Right. We'll stick with that, with the ruling. Okay.

(End of side bar discussion at 2:35 p.m.)

BY MR. PARDON:

Q Getting back to where we were, let me reask the question. What were you asked to do in connection with this case?

A I was asked to review the case and establish an opinion based upon my review, and my opinion was that—my first opinion was that the use of the taser was unreasonable.

My second opinion that I've established is that the handcuffing that was done on Mr. Kingsley was not done appropriately and could have led to the handcuffs not being applied appropriately to tension in the arms of [2-P-65] Mr. Kingsley.

The last opinion that I've established was that the control tactics done by Sergeant Hendrickson in the receiving cell of Mr. Kingsley were also unreasonable.

Q Okay. I'm going to ask you more detail about those opinions in a bit. But I would just like to back up a little bit and say what things did you do personally to come to those conclusions?

A I reviewed the incident reports that were supplied to me. I reviewed the videos that were supplied to me. I also reviewed the policies by Monroe County. I've reviewed the deposition of Mr. Kingsley. I've also used the—used the State training manuals

that were present at the time of the incident. And I used my own training and experience to establish my opinion.

Q Okay. Did you review the training records of the officers in this case as well?

A Yes, I did.

Q All right. All right. I'd like to turn now to your opinion on the use of the taser, and if you could summarize why do you believe that the use of the taser on Mr. Kingsley under this circumstance was unreasonable?

A The use of a taser is—a taser is a weapon. The use of a taser in our state and also throughout many

* * *

[2-P-79] A That's usually set there by the monitoring company in cooperation with the jail staff. Behind that is the toilet, so it gives the inmate some privacy when they're using the toilet.

Q Okay. I'm going to play this video for the jury to watch. It's going to take a couple of minutes, but I would like everyone to see it, as well as yourself.

(Video played 2:56-2:59 p.m.)

Q I'm going to stop it there. Just so we're clear, are you able to identify the point on the video when the taser began to be deployed?

A It appears to me that the taser was employed right around 6:46:46, I believe somewhere around that, 6:45, 6:46.

Q Okay. What I'll do is I'll play a short segment of it, and just so we're all clear, if you could point out where that begins if you're able to see it. Okay?

A Okay.

(Video played)

A Right about there.

Q So when you said *right about there*—

A 6:45:46.

Q Okay. Thank you. I'd like to discuss your professional observations of the video. What aspects of this video led you to the conclusion that Mr. Kingsley [2-P-80] was not exhibiting active resistance?

A I don't see a physical threat to the officers there. I see a man that is handcuffed behind his back laying face down in a bunk with weight or pressure from the officers, and there's no physical harm presented to the officers.

Q All right. I'm going to move to a segment of the film where I asked you about some movements that Mr. Kingsley made with his upper body. So if you would bear with me while I fuddle with the computer here and get to the point that I want to start, I appreciate that.

Okay. I'm going to begin it at 6:44:34 and I'm going to play it for a little bit. So beginning at 6:44:34.

(Video played)

All right. Now I've stopped the video at 6:44:52, and I'd like to ask you did you see Mr. Kingsley's head or upper body make any movements there?

A Yeah. Lifting off of the bunk.

Q Okay. And first of all, based on your reports or review of your reports from this case, do you know which person is at Mr. Kingsley's head?

A I believe that would be Sergeant Hendrickson.

Q Are you aware there was some mention in the [2-P-81] incident reports in this case about a concern that Mr. Kingsley might try to bite someone?

A Yes.

Q All right. Does it appear to you from your professional review of the video that the actions of Sergeant Hendrickson around the time that Mr. Kingsley was moving his head are consistent with someone who is concerned about being bitten?

A No.

MR. JONES: Objection. Competence. Foundation.

THE COURT: Overruled.

BY MR. PARDON?

Q Why?

A Anyone concerned about being bitten is going to pay attention to the person. You're not going to stand away from them. You're going to try to control their head. You're going to be directing your attention at them. There were several times just prior to that taser being used that Sergeant Hendrickson isn't doing any of those things. He's letting Mr. Kingsley move his head a little bit. He takes control of the head and he lets it go. He takes control and lets it go. If you're worried about being bitten, you don't do that.

Q Okay. Do you think that Mr. Kingsley, lifting his [2-P-82] head in these instances here, constitutes aggression or active resistance?

A No.

Q Why?

A There's no—again, there's no threat of intentional bodily harm from a person just lifting their head off a bunk.

Q All right. Let me ask you about some of the noise you heard on the video. Did you hear Mr. Kingsley grunting and groaning?

A Sure.

Q Did you hear him at one point swearing at the officers?

A Yes, I did.

Q All right. Does Mr. Kingsley's yelling or grunting or groaning or swearing constitute a threat that would make you say he's exhibiting active resistance that would justify the use of a taser?

A That in and of itself, no.

Q Why not?

A Well, because other parts of our manual are just applications of what you learn in your experience is that people are going to say things and people are going to express their frustrations in a different way doesn't necessarily mean that they're a live threat to my bodily [2-P-83] harm. The old adage sticks and stones may break my bones, but names don't hurt me. You've got to have thick skin as a police officer.

Q Are officers, in fact, taught appropriate verbal skills?

A Yes, they are.

Q In your opinion, were appropriate verbal skills used here?

A No.

Q And why is that?

A Well, when you're dealing with somebody who is agitated to this level and you have the ability to control them by outnumbering them in a semi-secure place of a county jail, talking to them and being more reasonable, when someone is shouting and another person is shouting, it just kind of escalates the tension in the environment.

I mean using a calmer approach—and that's why in our Disturbance Resolution Manual we talk about that and the verbalization manual, we talk about using lesser means of verbalizing to try to de-escalate or calm a person.

Q All right. Do you know what the deputies have said in their incident reports about the reason why the taser was applied?

[2-P-84] A I read the incident reports, yes.

Q Okay. And what is your understanding of the reasoning described in the incident reports?

A They described that there's resistance.

Q Okay. Did you understand as to whether they were attempting to remove the handcuffs?

A Yes.

Q Is it your understanding that they were attempting to overcome resistance so that the handcuffs could be removed?

A Yes.

Q All right. And in your view does that explanation comply with professional standards?

A No. If a person is actively resisting you and you feel this person is going to present bodily harm to you,

I know I would question them why are you taking the handcuffs off. So they can become more combative and have more fighting skill? It just does not make sense to me.

Q All right. Just assume for a second that Mr. Kingsley for some reason, he didn't want his handcuffs removed; he was, in fact, tensing them up and tried to prevent them from being removed. Are there other options that the deputies could have used in this situation instead of a taser?

[2-P-85] A Yes.

Q What?

A I guess the next option is just time. Cooler heads. Trying to resolve it a little bit more peacefully. Another option that was discussed was the use of a chair. I don't know what all Monroe County has available to them, but it's very clear to me that there was no active resistance. Using a little bit more time and diplomacy might have resolved this.

Q And again, just to be clear, is it preferable to leave somebody in handcuffs alone?

A No.

Q What would you do, in fact, if you were to back off a little bit? How would you handle that situation?

A Well, there's something that—and I believe that one of the—that Lieutenant Conroy touched on override. Override is when you see—and this is also trained in other areas of the academies—override is when you see that officers are getting frustrated. They're having problems dealing with somebody. So maybe somebody, kind of a new face, a new approach can step in there and try to take over. So there's an officer override factor that, you know,

maybe Lieutenant Conroy could have stepped in and said back out from here. And Mr. Kingsley, let's discuss this. Take a time out, if [2-P-86] you will. That's one area that you can use.

Another area is that you can maintain observation of him or maybe having somebody close by and just give him a little time right now. I just don't see that. You know, what is the urgency here.

Q Okay. I'd like to ask you about the incident reports that you said you reviewed. First of all, are you—are you familiar with procedures that officers use to write incident reports?

A Yes.

Q All right. And in general, how should an officer writing an incident report involving the use-of-force document that use?

A Well, they need to articulate their use of force. First thing they have to do is identify the actions factually as to why they had to use the force.

The next thing they do is they have to identify what tactics they used to respond to that level.

Last thing that they would do is to describe whether there was follow-through procedures, whether that's medical or just talking to the person, calming them down, whatever that they would use as well. All that has to be factual.

Q And in writing about an incident report, would you expect that an officer would sort of describe the worst

* * *

[2-P-97] the deputies complied with the Monroe County policy in this case?

A In particular attention is No. 4, "Intermediate weapon and the use of a stun device or an electronic security belt."

MR. JONES: I'm going to object to the testimony, Your Honor, as being irrelevant.

MR. PARDON: May I?

THE COURT: Mr. Pardon. Oh, I thought you wanted to be heard.

MR. PARDON: I do.

THE COURT: Okay. Go ahead.

MR. PARDON: I mean it's in his report and it's relevant to the expectations of how force was to be used.

THE COURT: I'll overrule the objection. I think this is appropriate testimony.

BY MR. PARDON:

Q Okay. You were referring to Sec. 4 I think of the report. How does that inform your opinions in this case?

A It informs my opinions that the expectation of performance by Monroe County employees was that the intermediate weapon, which would be in today's language—actually language at the time, but it was not [2-P-98] updated, would be protective alternative. So what they've essentially done is they said that where the state has said that you can use a taser or a stun device at a level of control alternatives which is—control alternatives would again be when you're facing active resistance or threat, they put it at one level even higher. Now—

THE COURT: I'm sorry, when you say *they*, who are you talking about?

THE WITNESS: Monroe County. I'm sorry, Ma'am. They put that at one level higher. So this is at a level that is in today's time, you would be faced with ongoing resistance or assaultive behavior in which you really have a definitive fear that you're going to be seriously hurt by this person.

So what Monroe County did is they told their deputies even though the state is saying this, you can use the taser at a lower level, we expect you to use it at an even higher level, which would be equal to use of a baton.

BY MR. PARDON:

Q All right. Set that aside then. Just briefly again then, could you, just to sum it up, summarize your opinion about why the use of the taser was not appropriate in this case?

[2-P-99] A There was no active resistance. There was no intentional threat of bodily harm against any of the deputies that were there.

Q All right. I'd like to ask you about a second opinion you expressed in this case. You testified earlier that the handcuffs were improperly applied. Do you recall that?

A Yes, I do.

Q All right. And that that, in fact, may have led to—it was possible that that led to tension and pain on the part of Mr. Kingsley. Do you recall that?

A Yes.

Q All right. And just to be clear, are you saying that there was resistive tension by Mr. Kingsley?

A I'm just saying that that was what was reported in the officers' reports.

Q Now you said that the handcuffs were put on improperly and I'm wondering if you could just describe and perhaps demonstrate to the jury a proper means of putting on a handcuff.

A Okay. Handcuffs are generally placed on a person in either a compliant or noncompliant fashion, whatever the subject is exhibiting at the time. In a compliant fashion, officers are trained how to verbalize with the person, how to stabilize a person, how they move in to

* * *

[LANDERS-CROSS-EXAMINATION]

[2-P-126] Q Let me ask it a different way because you can say that. When someone becomes trained in Wisconsin to be a jailer, so to work in a county jail—

A Yes.

Q —that training is through what people generally refer to as *jail school*; correct?

A Yes.

Q And that's a training program that lasts more than 100 hours; correct?

A I'd say there are 120 or 160 hours, depending upon the program.

Q It changes from time to time; correct?

A It doesn't change, it just depends on what technical college or what academy, how they facilitate the program.

Q You have never taught any courses as part of that formal jail school; correct?

A Correct.

Q We've talked about something called *POSC*, Principles of Subject Control; yes?

A Yes.

Q And that is a training guide that is used to train jailers, if I've got the phrase right, in Wisconsin; yes?

A Yes.

[2-P-127] Q You have never taught any courses about the POSC training guide; correct?

A Correct.

Q And there was—you were asked some questions about your role in developing the DAAT training guide; yes?

A Yes.

Q And your name is, in fact, in the DAAT training guide; correct?

A Correct.

Q Your name is not in the POSC training guide, is it?

A No, it's not.

Q You were not involved in writing or developing POSC, were you?

A No.

Q And jail school does not include training under the DAAT training guide, does it?

A Is it specific—are you saying is DAAT taught in the jail school?

Q Do they use DAAT, the training guide itself, in jail school?

A Well, the current POSC is based upon the DAAT training.

Q But they use POSC, it's not DAAT.

A Correct.

[2-P-128] Q Your highest level of education is a bachelor of science?

A Correct.

Q Have you ever published any professional articles or textbooks?

A No.

Q And you're serving as a paid expert in this instance; correct?

A Yes.

Q I'd like to ask you about some materials in POSC. If I could show you Exhibit 517. It will actually show up on—it should show up on your screen.

Do you recognize at least the first page of this exhibit?

A It's the POSC Manual from June 2009.

Q So was this the manual that was in place and being used at the time of the incident with Mr. Kingsley in May 2010?

A It should have been.

Q If I could refer you—

MR. JONES: Actually I would move the admission of 517, Your Honor.

MR. PARDON: No objection.

THE COURT: Received.

BY MR. JONES:

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

10-CV-832-BBC

MICHAEL KINGSLEY,

Plaintiff,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Defendants.

STENOGRAPHIC TRANSCRIPT OF THIRD DAY OF JURY TRIAL HELD BEFORE THE HONORABLE JUDGE BARBARA B. CRABB

October 16, 2012
11:00 a.m.
Madison, Wisconsin

APPEARANCES:

For the Plaintiff:

Merchant & Gould, P.C.
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JOEL GRAHAM
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Julie King, Paralegal

For the Defendants: Whyte Hirschboeck Dudek, S.C.
BY: ANDREW JONES
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Milwaukee, Wisconsin 53202

* * *

[3-A-49] THE COURT: All right. And without giving up any rights, we'll go right into the defendants' case at this point, reserving any rights that you have.

MR. JONES: Can we approach briefly, Your Honor.

THE COURT: Sure.

(At side bar.)

MR. JONES: Only because I wanted to be actually clear that I understood what you were saying, we do have a motion. We would like to make a motion under Rule 50.

THE COURT: Right. I assumed that you would. And you are not losing any rights and not arguing it at this moment.

MR. JONES: Okay.

THE COURT: That's what I wanted to make clear to you. I guess I didn't do a very good job.

MR. JONES: Paranoia, Judge.

(End of side bar.)

THE COURT: Mr. Jones, you may call your first witness.

MR. JONES: Thank you, Judge. We would like to call Karl Blanton.

KARL BLANTON, DEFENDANTS' WITNESS, SWORN

DIRECT EXAMINATION

BY MR. POSNANSKI:

Q Good afternoon, Mr. Blanton. Could you please state [3-A-50] your name for the record?

A Karl Blanton.

THE COURT: Is that a K-A-R-L or C-A-R-L?

THE WITNESS: K.

THE COURT: Thank you.

BY MR. POSNANSKI:

Q Mr. Blanton, you were formerly employed by the Monroe County Sheriff's Department?

A Yes, that's correct.

Q How long did you work there?

A I believe it was for about four years.

Q Do you know approximately when you started?

A February of 2009.

Q And when did you leave your employment with the Monroe County Sheriff's Department?

A My last day was September 1st of this year.

Q And why did you leave?

A To go back to school and change careers.

Q Are you currently in school?

A Yes, I am.

Q Where?

MS. WARD: Objection. Relevance, Your Honor.

THE COURT: Sustained.

BY MR. POSNANSKI:

Q Are you currently employed?

* * *

[3-A-67] A No, he did not.

Q What happened after that?

A At that time, since we had more room, we went ahead and decided that a deputy grab each limb, would be once again Sergeant Hendrickson and I would have the upper torso. I believe I was on the left arm, Sergeant Hendrickson was on the right arm. And I believe two deputies were—had each leg. I'm not sure which deputies those were.

Q And where was Mr. Kingsley carried ultimately?

A Ultimately he was carried to one of our receiving cells in our receiving areA We have three of them.

Q And can you describe how he was carried in and placed in the cell?

A Yes. He was—once again I believe four deputies. I had the left upper torso under his left arm, Sergeant Hendrickson had up under his right arm, and two deputies had each of his legs. He would have been in the facedown position as we carried him. We carried him through one doorway, then the second doorway, then we laid him facedown on the concrete bedding that is in a receiving cell.

Q Once he was placed on the concrete bunk, what did you and the other officers do?

A At that time we were trying to get the handcuffs off [3-A-68] of Mr. Kingsley. Mr. Kingsley was not making it easy for us, struggling, trying to flex, making it more difficult to remove the handcuffs with his wrist, grunting, showing a lot of anger, and we were trying to get the handcuffs off at that time.

Q Why did you want to remove the handcuffs?

A You want to remove the handcuffs once you have somebody in a receiving cell because that would be a safe place for them. Leaving somebody in there that is under distress, their hands behind their back, can severely hurt themselves and others. So it's a good option to try to remove the handcuffs as soon as possible to make sure that they don't hurt themselves. There's not a lot you can do when you're in handcuffs behind your back when you could possibly hurt yourself.

Q Did you have any role with respect to removing the handcuffs?

A I'm sorry. Can you repeat that?

Q Did you have any role with respect to removing the handcuffs from Mr. Kingsley?

A I did. I had the handcuff key and I was the one trying to remove the handcuffs.

Q As you attempted to remove the handcuffs, what was Mr. Kingsley doing?

A Mr. Kingsley was kind of rolling, shifting, flexing; [3-A-69] trying to pull the handcuffs apart as I'm trying to take them off, which made it difficult; lifting his upper torso, grunting, moving his hands; definitely was not making it easy to where I can remove the handcuffs.

Q Is it fair to say that Mr. Kingsley did not cooperate with your efforts to remove his handcuffs?

A That is correct.

Q You described a number of things that he was doing as you attempted to remove the handcuffs. I want to make sure that I understand all of these things.

A Sure.

Q You indicated that he was pulling his arms apart?

A Yes.

Q Moving his hands?

A Yes.

Q Lifting his torso?

A Yes.

Q Tensing his arms?

A Yes.

Q Was there anything else?

A I would guess also just kind of rolling back and forth just trying to, you could say, make it difficult or resisting. He was asked multiple times, stop resisting, making it harder for us to try to get these off.

Q I don't want you to guess. Was he rolling? Was he [3-A-70] moving?

A He is—he would move just a little bit left to right. I wouldn't say rolling, but just kind of moving, swaying left to right.

Q Thank you. As you were attempting to get the handcuffs off of Mr. Kingsley, did he attempt to pull his hands or arms away from your grasp?

A He was moving them, so I don't know if he was pulling them away from my grasp, but moving them enough to where I wasn't able to get the key into the keyhole. I felt like there was a lot of tension on the cuffs and his arms.

Q You described that he was lifting his torso. Did he attempt to lift his body off of the bunk?

A I don't know if he was lifting his body, but his upper torso kind of came up off the bunk.

Q Did you and the other officers do or saying anything to counteract his resistance?

A Multiple times trying to explain to Mr. Kingsley, let's get these cuffs off, let's work out this issue, let's just deal with this in a safe way, stop resisting, stop fighting us, let's get these cuffs off.

Q What was his response?

A A lot of grunting and hollering, just grunting, anger, frustration, is what I got out of it.

[3-A-71] Q Did any of the officers' efforts to get him to stop resisting work?

A No, they did not.

Q Can you explain that?

A Multiple efforts of trying to talk him down, trying hold him down, would not succeed.

Q Did Mr. Kingsley's resistance create a risk to anyone in the cell?

MS. WARD: Objection. Leading.

THE COURT: Overruled.

A To himself and to other officers, yes.

Q Can you explain that?

A Just the lifting of the torso, other officers on top of him, the moving around, can fairly—there's multiples things that could happen for people's safety when trying to resist. I can't assume, but multiple things could happen.

Q When you said "for people's safety," by that, what do you mean?

A I mean the inmate and the officers, yes.

Q You indicated that Mr. Kingsley was making some sounds at this time?

A Yes.

Q Could you describe those?

A It sounded like grunting out of anger and [3-A-72] frustration, is the way that I took it.

Q Do you know whether he was grunting because he was in pain?

A No. I did not take any of that as being in pain. I have experienced people being in pain, you know, "Get these off. I'm in a lot of pain." None of that came out.

Q Based on your experience, what did you perceive the sounds that he was making to be?

A In my experience it's just aggression, anger and frustration.

Q What happened next?

A After that, still trying to get the handcuffs off, at some point in time I believe there was an order by Sergeant—there was an order by Sergeant

Hendrickson to drive stun or tase Mr. Kingsley and that was done by Deputy Degner. And then at that point in time we were still trying to get the cuffs off. That still didn't happen. And eventually, a few moments later, Lieutenant Conroy asked for all the inmates—or I'm sorry—all the officers to step out.

Q If Mr. Kingsley was resisting your efforts, why were you still trying to remove the handcuffs?

A I think it came down to safety for Mr. Kingsley was the most important part. Leaving somebody handcuffed [3-A-73] behind their back in a cell like that is very dangerous, so it's very important to try to get those handcuffs off so that person is not left in a place by themselves with their hands behind their back.

Q "Cell like that," what do you mean?

A It's a receiving cell. It's concrete all around. There's places they can stand up on a ledge and try to hurt themselves and things of that sort.

Q Once the taser was applied, did Mr. Kingsley stop resisting?

A During the tasing the body tensed up. And then shortly after I think he was more agitated and he was still resisting. I was not able to get the cuffs off. There was still some struggling with the hands, a lot of anger, and we were still not able to get the cuffs off.

Q What happened at that point?

A At that point we were not able to get the handcuffs off. Lieutenant Conroy I believe gave the order for all the deputies to step out.

Q Upon receiving that order from Lieutenant Conroy, what did you do?

A Once we're—then we all stepped out, not at the same time. I believe I was probably the second one out and I believe Degner or Sergeant Shisler was the last one out.

[3-A-74] Q At the time that Lieutenant Conroy gave the order for the officers to leave the cell, was there any force used on Mr. Kingsley by any of the officers from that point forward until you left the receiving cell?

A No, I don't believe so.

Q Did you have any further interactions with Mr. Kingsley in connection with this incident?

A Before this incident or—I'm sorry.

Q Let me rephrase that. After you had left the cell the other officers on May 21st, 2010, did you have any other further involvement with Mr. Kingsley that day?

A Yes, I did. A short time after we went back with I believe three other deputies and we were able to get the cuffs off of Mr. Kingsley at that time.

Q Do you know who, besides yourself, was involved in that?

A I believe it was Deputy Wildes, Deputy Bedenbaugh, myself and I believe there was one more. I'm not sure.

Q What was your role?

A At that time I was—I had the taser outside the cell.

Q Who was responsible for removing the handcuffs, if you remember?

A I do not remember.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

10-CV-832-BBC

MICHAEL KINGSLEY,

Plaintiff,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Defendants.

STENOGRAPHIC TRANSCRIPT OF THIRD DAY OF JURY TRIAL AFTERNOON SESSION HELD BEFORE DISTRICT JUDGE BARBARA B. CRABB, and a jury

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October 16, 2012
1:46 p.m.
Madison, Wisconsin

APPEARANCES:

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* * *

[3-P-14] STANLEY HENDRICKSON,
DEFENDANT, SWORN,

DIRECT EXAMINATION

BY MR. JONES:

Q Would you please state your full name for the record.

A Stanley Vernon Hendrickson, Junior.

Q And you're employed by Monroe County?

A That's correct.

Q By the Sheriff's Department?

A Correct.

Q What's your current rank?

A Lieutenant.

Q Do you mind if I call you Sergeant since that was your rank at the time of the incident?

A That's fine.

Q And how long have you worked for the Sheriff's Department?

A Since August of 2000.

Q And you said you were a Lieutenant. What's your current job?

A I am the Jail Administrator for the Monroe County Jail.

Q How long have you been the Administrator?

A Since June 30th of last year.

Q What does it mean to be the Jail Administrator?

* * *

[3-P-30] A It is a floor plan of the section of the jail.

Q And there are some red lines on the jail; yes?

A Yes, there are.

Q What do those lines depict?

A They indicate the direction from the fifth cell in south block down the hallway, out the hall into the foyer area of receiving, into the third receiving cell.

Q What do those lines coincide with as it relates to this case?

A The route that we took Mr. Kingsley.

MR. JONES: I'd like to move the admission of 510B, Judge.

MR. PARDON: No objection.

THE COURT: I have 10E [verbatim] is received.

MR. JONES: May we publish it to the jury, Judge?

MR. PARDON: Yeah.

THE COURT: Yes, you may.

MR. PARDON: Sorry.

BY MR. JONES:

Q And again, as we're looking at this, this simply relates the route that Mr. Kingsley was taken from his cell to the receiving cell; correct?

A Correct.

Q Am I correct that once Mr. Kingsley was in the [3-P-31] receiving cell and had been laid on the bunk, you and Officer Blanton were attempting to take the handcuffs off?

A Correct.

Q And we've heard testimony from Officer Blanton and Lieutenant Conroy on this subject, but I'd like in your own words for you to tell us why you were trying to take his handcuffs off.

A To take the handcuffs off?

Q Yes.

A We generally do not leave people unattended in a cell with handcuffs on due to the possibility of injuring themselves.

Q You said generally you don't do that?

A Well, we don't. Standard practice is we don't.

Q All right. Do you ever do that if you can avoid doing it?

A Absolutely. Absolutely avoid it, yes.

Q Just to be clear, you're saying you absolutely avoid leaving people in the cells with handcuffs on?

MR. PARDON: Objection. Leading.

THE COURT: Overruled.

THE WITNESS: Yes.

MR. JONES: Thank you.

[3-P-32] BY MR. JONES:

Q Did you say anything to Mr. Kingsley as Officer Blanton was trying to take the handcuffs off?

A "Stop resisting. Relax. Stop resisting. Relax." Numerous times.

Q We heard on the audio from the recording that different tones of voice were used; correct?

A Correct.

Q Can you explain why you and the other officers used different tones of voice as you were speaking to Mr. Kingsley?

A To try to persuade him.

Q And what was the purpose of using more aggressive louder tones of voice?

A To deliver an ultimatum to get him, you know, to stop, relax right now so we can get these off.

Q And what did you personally observe Mr. Kingsley doing as you were trying to take the handcuffs off?

A He was flexing and tensing, moving his hands, shrugging back and forth, making it hard to remove the handcuffs.

Q And flexing and tensing, flexing and tensing what?

A His arms, his body, pulling his arms apart, tightening his muscles, making it difficult so we couldn't maneuver to get in to get the handcuffs off.

[3-P-33] Q When you said he was moving his hands, can you tell us how he was moving his hands?

A Back and forth, twisting them out, pulling them apart.

Q And you said he was shrugging. Can you tell us what you mean by that?

A The shoulders moving like this back and forth.

(Indicating)

Q Can you describe it for the record?

A Side to side I guess would be the best way to describe it.

Q In your own words, can you tell us why that made it difficult to take the handcuffs off?

A It's hard enough to take them off when you're being still. It's a small hole, a small key. When people are moving and the cuffs are being moved, they're being taunt, it's really difficult to try to get those off.

Q Was there any other movement that you observed in Mr. Kingsley's upper body beyond what you've already described for us?

A He raised his upper torso off the bunk.

Q What did you hear Mr. Kingsley say as this was going on?

A "Get the mother's off, get the motherf'ers off" at one point and "get the 'f' out at another point."

[3-P-34] Q At any point after you put—well, strike that. At any point in the receiving cell did Mr. Kingsley say to you or any of the other officers that he was in pain?

A No, he did not.

Q Did Mr. Kingsley at any point in the receiving cell say to you or the other officers that the handcuffs were too tight?

A No, he did not.

Q Did he say to you at any point after you put the handcuffs on that they were too tight?

A No.

Q Did he say to you at any point in the receiving cell that he couldn't do what you were asking him to do?

A No, he did not.

Q We've listened to the recording obviously and we've heard other sounds that Mr. Kingsley was making. Do you remember those sounds?

A Yes.

Q How did you perceive those sounds?

A As anger. Aggressive sounds.

Q And can you tell us why that was your reaction to those?

A The tone and the growl that was in the noise.

Q You told us that you had directed him to stop resisting and to relax; right?

[3-P-35] A Correct.

Q Did you do anything physically to respond to what you were seeing and hearing from him?

A At one point when he lifted his torso up, I tried to stabilize him by pushing down on his upper torso, and with my hand to his head, I had my hand—do you want me to demonstrate?

Q Sure.

A I had my hand on the side of his head holding him down so he was more stable so he couldn't move around. I did at one point place my thumb in a pressure point right below the ear.

Q And why did you react to him lifting his torso off the bunk with what you've just described for us?

A It was my feeling that was an aggressive move. I felt threatened by it, so I wanted to restabilize and put him back down so he was not able to move around.

Q And why did you put your hand on his head in the way you've described?

A Once I pushed down on him and had him down, his head—his mouth was open, his head went towards my lower shanks. I had my leg back up on the—across his shoulder area and his mouth was open and he came towards me I think at that point and that's when I placed my hand—I moved my hand up to his head right away.

[3-P-36] Q And the pressure point that you described, can you tell us a little bit more specifically what you were doing?

A I was taking the thumb, the pad of my thumb, and pushing in towards the other side. There's a cluster of nerves there. If you push on it, it causes a pain sensation and you try to gain compliance by using pressure points.

Q Is that something that you're trained to do as part of jail school?

A Yes.

Q You mentioned in one of your answers just now the placement of your leg on Mr. Kingsley.

A Yes.

Q Can you tell us again what you were doing in that respect?

A I was trying to maintain control of Mr. Kingsley by stabilizing with the leg and shin area of my right leg.

Q And where was the leg and shin area of your right leg? Where did you have that on him?

A Across the upper back, the shoulder area.

Q Did you—how much pressure did you have on your leg when you were doing that?

A I was applying just enough pressure to maintain control.

[3-P-37] Q Did you have the weight of your knee directly on Mr. Kingsley's spine?

A No, I did not.

Q Did you put the weight of your knee directly on his neck?

A No, I did not.

Q Did you put the weight of your knee or leg directly on his head?

A No, I did not.

Q The things that you've described that you did and said, to your observation did they have any effect on getting Mr. Kingsley to stop doing what he was doing?

A No, it did not.

Q So he continued with the behaviors that you've already described?

A That's correct.

Q Did you have any concerns about what was happening in the receiving cell?

A Yes, I did.

Q What were your concerns?

A Well, my concerns were for safety for not only the staff and other officers' safety, but for Mr. Kingsley as well.

Q What specifically were your concerns in terms of safety?

[3-P-38] A Injury. Mr. Kingsley could bump his head, roll off the bed with the cuffs left on. He could slap his head into the wall if he kept thrashing around, enough to where he got over there. Officers' safety. Kicking. Biting. There's a metal lip on the edge of the bed. Somebody could have slipped and was injured that way.

Q You mentioned that, to go back a little bit in your testimony, you mentioned at one point in connection with when you had your hand on Mr. Kingsley's head that he had his mouth open and in your direction; correct?

A Correct.

Q Did that raise any concerns for you?

A Yes, it did.

Q What was the concern?

A The concern of biting.

Q Mr. Conroy, Lieutenant Conroy in his testimony, there were some questions and he gave

some testimony about conversation you and he had after these events—

A Correct.

Q —correct? Can you relate to us in your own words what happened or what that conversation was about?

A We spoke about the reason for the tase, why we used the taser. We discussed the plan forward from that point too.

Q And what was the discussion about in terms of the

* * *

[3-P-40] Conroy on that occasion?

A I had seen Mr.—Lieutenant Conroy's report and it said I told him that Mr. Kingsley tried to bite me and I told him that that was not factual.

Q Is it fair to say that you—well, from your perception, is it fair to say that you and Lieutenant Conroy had miscommunicated about that issue?

A Yes.

MR. PARDON: Objection.

Q I want to go back to May 21st. We had talked about your efforts physically and verbally to respond to what Mr. Kingsley was doing; correct?

A Correct.

Q And at some point you directed Deputy Degner to use the taser; correct?

A Correct.

Q And are you yourself trained to use a taser?

A Yes, I am.

Q And what was the course of training that you undertook to learn that? Sorry, I'll ask a better question.

A Okay.

Q When were you trained to use the taser?

A We get training every—I believe it's every other year on the taser.

[3-P-41] Q Okay. And can you tell us in your own words why you told Deputy Degner to tase Mr. Kingsley?

A Due to the concerns I had for injury to Mr. Kingsley and the staff and the noncompliance up to that point of Mr. Kingsley's resistance.

Q What did you hope to accomplish by using the taser?

A His compliance. His stopping of the resistance. We could remove the cuffs and exit safely.

Q Mr. Kingsley testified that you said loud enough for him to hear "tase his ass."

A I did not.

Q Did you say that?

A No, I did not.

Q At the point in time when you told Deputy Degner to tase him, did you feel there were other suitable or reasonable alternatives to using a taser?

A Not at the time, no.

Q Can you explain why that was your reasoning?

A The only other option would be going to the next level actually, using four strikes, and I didn't see it necessary to do that.

Q And you had used presence, that is the physical presence of officers; correct?

A Correct.

Q And you had used dialogue; correct?

[3-P-42] A Correct.

Q That is you had tried to verbally communicate with him.

A Correct.

Q You had used physical efforts on your part—

MR. PARDON: I'm going to object to this line of questioning as leading.

THE COURT: Sustained.

BY MR. JONES:

Q If Mr. Kingsley was resisting, why in your mind was it still a good idea to take the handcuffs off?

A Going back again to the possibility of injury to Mr. Kingsley if you left him alone with handcuffs on and the possibility of doing a re-injury and having more risk to staff at the time.

Q Once the taser was used, did Mr. Kingsley stop doing what he was doing?

A No, he did not.

Q Can you describe what was occurring after the taser was used?

A He was still resistive.

Q Was it the same behaviors or was it different behaviors from that point?

A He was still moving his hands, pulling his hands apart slightly.

[3-P-43] Q In that respect was the taser used a success?

A No.

Q At that point, Lieutenant Conroy directed everyone to exit the cell; am I right?

A Correct.

Q And did you use any force on Mr. Kingsley from that point forward?

A No.

Q Did you have any further interactions with Mr. Kingsley as it relates to this incident from that point for?

A No.

Q Before we finish, I'd just like to go back briefly to the use of the taser. Did you direct that Deputy Degner use the taser against Mr. Kingsley because he wouldn't take the paper off the light in his cell?

A No.

Q Did that have anything to do with why you decided it was necessary to use the taser?

A No.

Q Did you direct that Deputy Degner use the taser against Mr. Kingsley out of anger?

A No.

Q Were you angry at him?

A No.

[3-P-44] Q And did you direct that Deputy Degner use the taser in some way to show who was boss?

A No.

Q Is that anything that you do as an officer?

A No, it is not.

Q Did you direct that the taser be used as punishment for Mr. Kingsley?

A No.

Q And did you direct that the taser be used in some way to harm Mr. Kingsley?

A No.

MR. JONES: Thank you. (2:36 p.m.)

THE COURT: Mr. Pardon.

MR. PARDON: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. PARDON:

Q Again, I apologize for calling you Sergeant Hendrickson. Since everybody has, I'm going to address you as Sergeant Hendrickson. Okay?

A That's fine.

Q Turning your attention to the evening before this incident, just want to be clear, you personally did not have any contact with Mr. Kingsley on the night of May 20th; correct?

A Correct.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

10-CV-832-BBC

MICHAEL KINGSLEY,

Plaintiff,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Defendants.

STENOGRAPHIC TRANSCRIPT OF THIRD DAY OF JURY TRIAL AFTERNOON SESSION HELD BEFORE DISTRICT JUDGE BARBARA B. CRABB, and a jury

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October 16, 2012
1:46 p.m.
Madison, Wisconsin

APPEARANCES:

For the Plaintiff:

Merchant & Gould
BY: EDWARD PARDON
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For the Defendants: Whyte Hirschboeck Dudek
BY: ANDREW JONES
TIMOTHY POSNANSKI
One East Main Street
Madison, Wisconsin 53703

* * *

[3-P-62] MR. JONES: Call Deputy Degner.

FRITZ DEGNER, DEFENDANT, SWORN,

DIRECT EXAMINATION

BY MR. JONES:

Q Deputy, could you state your full name for the record.

A Fritz Alfred Degner.

Q And you're employed by the Sheriff's Department?

A Yes, I am.

Q Monroe County Sheriff's Department?

A Yes, I am.

Q How long have you worked at the Sheriff's Department?

A Since July of 1992.

Q And do you have any other law enforcement experience?

A Yes, I do. I was previously employed by the Sparta Police Department.

Q For how long?

A Eleven years.

Q And you're a deputy sheriff; correct?

A That is correct.

Q And you've been a deputy the entire time you've worked for the Sheriff's Department?

A Yes, I have.

* * *

[3-P-71] repeatedly what was wrong with his feet. What hurt. Which foot. With no response out of him.

Q And at some point he was then carried into the receiving cell?

A That is correct.

Q And we've seen on the video where you positioned yourself in the cell, the receiving cell itself?

A Yes.

Q Can you describe in words where that was?

A In the receiving cell—when you came into the receiving cell, again, as it was described before, the bunk is immediately to the left of the door. Mr. Kingsley was laying face down on that. Sergeant Shisler was at his feet. When I had entered in, Deputy Blanton was in the middle section where the handcuffs and his hands would be and Sergeant Hendrickson was at his head. I stood behind Sergeant Hendrickson and Deputy Blanton, basically up against the wall.

Q Why did you position yourself there?

A In case I needed—you know, they needed assistance from me.

Q And did you observe what was going on as the officers tried to take the handcuffs off?

A For as much as I could see past them.

Q And what, if anything, did you see as that was [3-P-72] occurring, given your vantage point of course?

A I could see movement out of Mr. Kingsley. I could see the officers moving. The more of what I was aware of was the verbalization where they were telling him to relax so they could take the handcuffs off and to quit resisting.

Q Did you observe anything in terms of his upper body or shoulders in terms of movement?

A When I—specifically when I put the taser on him where I had placed it on his shoulder is when I could see that he was shrugging and moving around. I could see that his arms were not—weren't—he wasn't keeping them still. He had a lot of tension and his muscles were tight.

Q Could you see anything in terms of what Mr. Kingsley was doing with his hands—with his arms down where the handcuffs were?

A Yes. Yesterday when Mr. Landers demonstrated the handcuffs, he had demonstrated them being in front. When we move people or when we transport people, normally the handcuffs are put in the back. It's more of a safety issue than anything else because it's for our safety. When someone is handcuffed in the front, it gives them leverage to come behind us or assault one of us. So his hands were behind his back. And what he [3-P-73] had, his fists were clenched. Imagine my hands are behind my back. He was pulling against them like this and growling.

Q Tell us more what you—strike that. What specifically did you hear Mr. Kingsley—what sounds did you hear from him?

A There was grunting. Again, to me it sounded like a growling like a bear. He wasn't verbalizing, other than what he initially verbalized at the beginning when he was first brought in and told to relax about taking the handcuffs off.

Q And how did you perceive the sounds he was making?

A I perceived them as threatening.

Q Did Mr. Kingsley say he was in pain at any point?

A No, he did not.

Q Did he say the handcuffs were too tight at any point from when they were put on until when he left the receiving cell?

A Not once.

Q Did Mr. Kingsley say in the receiving cell that he couldn't do what the officers were asking him to do?

A No, he didn't.

Q Did you—we've heard from Officer Blanton and Sergeant Hendrickson what they were doing in terms of trying to get the handcuffs off or to stop Mr. Kingsley [3-P-74] from doing what he was doing.

A Yes.

Q From your observation, did what they were saying or doing, did that have any effect on what Mr. Kingsley was doing?

A No, it did not.

Q Did it get him to stop?

A No.

Q Did you have any concerns about what was happening?

A Yes, I did.

Q Can you tell us what those concerns were?

A There were a number of concerns obviously as has been stated multiple times: The safety issue as far as with Mr. Kingsley fighting against us; the potential for him getting hurt; us getting hurt should he decide to escalate it. We're taught when dealing with people, as Mr. Landers explained, to look at everything that's going on with this. In 20 years, I've never had anybody fight us on taking handcuffs off. Everybody wants them off and they want them off as fast as they can because they're uncomfortable to have on. That wasn't the situation.

So when we're trying to take the handcuffs off and he's pulling on the handcuffs where the handcuff chain is so tight that you couldn't hardly manipulate the [3-P-75] handcuff from what it appeared to me, that's one of the things, you know, that I didn't know if he was trying to break the handcuff, which could then lead to a sudden assault by him. I couldn't see what was going on with his head because of where Sergeant Hendrickson was placed. So the discussion that was brought up as far as any actions by him I couldn't tell you.

But again, we're in the concrete cell where the edge of the cell shows where the black spot is, where the toilet is. That actually has a sharp—I would say a fairly sharp corner on it.

We talk about not leaving people handcuffed. One thing, as far as the law enforcement, we're taught not to let somebody walk or move unescorted with their

handcuffs behind their back because of the fact they can't catch themselves and I've experienced it where I've been escorting people who've pulled away from me and have fallen because of that.

Q You mentioned early on in your answer something about escalation.

A Yes.

Q Can you explain what you meant?

A Any situation can escalate rapidly. I don't know what his intent is. All I know is he's not complying with what he's told to do. I don't know if he's trying [3-P-76] to break the handcuffs. Somebody with broken handcuffs has two weapons on their wrists.

We recently had an officer assaulted by somebody with handcuffs that were—

MS. WARD: Objection, Your Honor. I'm going to move to strike that last part.

THE COURT: Sustained. The jury will disregard it.

THE WITNESS: Could you reask the question, please?

MR. JONES: Sure.

BY MR. JONES:

Q What was your concern about escalation?

A This was a volatile situation. Anything could have happened rapidly within it, whether he started to kick, again, the handcuffs, whether he tried to bite. I don't know. Any one of those could have gone on.

Q What about what had happened gave you a concern that the situation might escalate?

A Normally, like I said, anybody who is in handcuffs wants them off and they don't fight us to get them off. So by the fact that this whole situation, we were present. We've talked to him. We've tried to get him to comply with what we were trying to do. We used as many methods as we could up to that point and none of [3-P-77] them were being effective, and so they could have become—things could have changed very rapidly.

Q So at some point Sergeant Hendrickson told you to tase Mr. Kingsley; correct?

A That is correct.

Q Did he tell you to "tase his ass"?

A No.

Q Did you disagree with Sergeant Hendrickson's order to you?

A No, I didn't.

Q What would you have done had you disagreed with this order from your superior officer?

A I would have figured out some way to explain to him that I didn't feel it was justified at that moment to do things like that.

Q So what did you do once the Sergeant gave you the order?

A From when he told me to tase him, there was maybe a few second lapse in there before I actually pulled the trigger on the taser.

Q But you did?

A Yes, I did.

Q And that was on the back of his right shoulder?

A Yes, it was.

Q And are you trained in the use of a taser?

[3-P-78] A Yes, I am.

Q And how did you obtain that training?

A Interdepartmental training. We have two taser instructors on our staff.

Q And you use a contact stun; correct?

A Yes, I did.

Q How long was the taser applied in this instance?

A For one cycle of five seconds.

Q And how many times did you tase him?

A Just one time.

Q After you tased Mr. Kingsley, did he stop doing what he was doing?

A No, he didn't.

Q And at some point Lieutenant Conroy directed everyone to leave the cell; correct?

A That is correct.

Q Did you agree or disagree with that order?

A I agreed.

Q And what did you do?

A Well, first—I told Sergeant Hendrickson to go first because it was easy for him to come out and go past, and I remained there with the taser on Mr. Kingsley's back until Deputy Blanton left, and then Sergeant Shisler left. Because keeping control of the legs is the most important thing at that time as [3-P-79] everybody was disengaging. Once everybody

was out of the cell, I disengaged from Mr. Kingsley and removed the taser from his back and went out of the cell.

Q Do you use the taser against Mr. Kingsley because of whatever—because of whatever he had done to require that he be moved to the receiving cell?

A No, I did not.

Q Did you use the taser to punish Mr. Kingsley?

A No.

Q Did you use the taser because you were somehow angry at him?

MS. WARD: Objection. Leading.

THE COURT: Overruled.

THE WITNESS: No.

BY MR. JONES:

Q Did you use the taser to somehow show him who was boss in this situation?

MS. WARD: Objection. Leading.

THE COURT: Overruled.

THE WITNESS: No, I did not.

BY MR. JONES:

Q Did you use the taser in any way, shape or form for the purpose of causing harm to him?

A No, I did not.

MR. JONES: Thank you, Deputy.

[3-P-80] THE COURT: Ms. Ward.

MS. WARD: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. WARD:

Q When you got to the jail on the morning of May 21, 2010, you, Sergeant Hendrickson, Deputy Blanton, Sergeant Shisler and Lieutenant Conroy had a discussion about what each one of you would—what role you would take in addressing Mr. Kingsley; is that correct?

A That's correct.

Q And in that discussion, it was decided that you were going to cover with the taser in case he became violent; correct?

A If need be.

Q Is the answer yes?

A Yes.

Q And your recollection is that when the officers approached Mr. Kingsley in his cell, he was argumentative; right?

A Yes.

Q But you don't recall Mr. Kingsley making any threats to use physical violence against any of the officers; correct?

A No, I did not.

Q In fact, Mr. Kingsley told the officers at the time

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed: 11/05/12]

10-CV-832-BBC

MICHAEL KINGSLEY,

Plaintiff,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Defendants.

STENOGRAPHIC TRANSCRIPT OF FOURTH
DAY OF JURY TRIAL
HELD BEFORE DISTRICT JUDGE
BARBARA B. CRABB, and a jury

October 17, 2012
9:00 a.m.
Madison, Wisconsin

APPEARANCES:

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For the Defendants: Whyte Hirschboeck Dudek
BY: ANDREW JONES
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One East Main Street
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* * *

[4] and Fritz Degner.

THE COURT: Thank you. And Mr. Jones, you may call your witness.

MR. JONES: We'd like to call John Peters.

THE COURT: He's here?

MR. JONES: He is here.

JOHN PETERS, DEFENDANTS' WITNESS, SWORN,

DIRECT EXAMINATION

BY MR. POSNANSKI:

Q Good morning.

A Good morning.

Q Can you please state your full name for the record, please.

A John G. Peters, Junior. P-e-t-e-r-s.

Q Where do you live?

A I actually live in Las Vegas, Nevada.

Q Where are you from originally?

A Lancaster County, Pennsylvania.

Q I'm going to show you what has been marked as Exhibit 519.

MR. POSNANSKI: Erica, can we get—

THE CLERK: I'm sorry.

Q Can you tell me what this is?

A It looks like a copy of my resume.

Q The full copy of your resume is in the binders [5] behind you if you need to see it. I can page through this if you need to.

My question is does this completely and accurately reflect your professional education and experience?

A I see this is dated December of 2011. There's been a couple updates since then, but most of it has stayed the same.

Q Can you describe your educational background?

A After high school I went to the Northern Virginia Community College in Andover, Virginia and obtained an associate applied science degree in police science. I also obtained a certificate in corrections from that same institution.

From there I took a year off. I went back to work or went back to school, I was working as a police officer, and I obtained a bachelor of science degree in criminal justice at the University of Baltimore in Baltimore, Maryland.

From there I took an academic leave of absence from the Sheriff's Department and went to Boston University and obtained a master's degree in public relations, and then went on to Babson College in Wellesley, Massachusetts and picked up a master's degree in business administration.

About 20 or so years later, I went back to school [6] and got my Ph.D. in applied management and decision sciences. And in June of this year, I completed my

academic requirements for the California teaching credential for the state of California.

Q What do you do for a living?

A My primary work is I run the Institute for the Prevention of In-Custody Deaths, which is a law enforcement training firm. It's in Henderson, Nevada, which is the next town over from Las Vegas. And we primarily train instructors; in other words, it would be called *train the trainers* where we go out and conduct training, primarily in the area of excited delirium or arrest-related deaths, and also forensics where you have an associated death, let's say from restraint or from tasers or pepper spray. Whatever the claim is, we teach basically how to forensically process that at the scene, what to collect, how to collect it, how to preserve the evidence.

I also have another training firm called the *Defensive Tactics Institute*, and in that training firm, which is primarily hands-on, we teach not only the weaponry which would be handcuffs, batons, flashlights, unarmed self-defense. But no handguns. We don't do any type of firearms training.

Q What's your position with the Institute for [7] Prevention of In-Custody Deaths?

A I was the founder, President, and also hold the title of Chief Learning Officer.

Q As Chief Learning Officer, I presume that means you teach?

A I do teach. I'm one of the instructional designers for programs, but Chief Learning Officer primarily focuses on identifying the appropriate scientific literature that's out there relative to what causes death, the science behind arrest-related deaths, that

type of thing. So my job basically is, in addition to the management side, is also looking at what's the current literature, what's the current science, then incorporating that into our training programs.

Q In your previous answer you talked about the fact that you train the trainer. To whom do you teach?

A We go all over North America to train. I won't go into a lot of detail, but some of the agencies that we've conducted training for, it's been the Los Angeles Police Department; Los Angeles County Sheriff's Department; United States Department of State; I've been here in Wisconsin at the Fox Valley—I believe it's called Technical College; other colleges here.

Most recently, two weeks ago I just got back from Toronto, Canada. We were up there in Ontario Province [8] with the Peel Regional Police. And I've also conducted training in the United Kingdom with the Royal Army Physical Training Corps, as well as the London Metropolitan Police and the Kent Constabulary in southern England in the Dover area.

Q How many years have you taught courses affiliated with this institute?

A With the Institute for the Prevention of In-Custody Deaths, it would be since 2005, which would be—it was seven years in March of this year; with Defensive Tactics Institute it's been since 1979.

Q In your role with the Institute for Prevention of In-Custody Deaths, you design curricula or taught courses regarding use of electronic control devices?

A Yes.

Q Do electronic control devices have another name?

A Yes. The most popular name for electronic control device is a *Taser*, t-a-s-e-r. There's another brand on the market called *CarbonArms*, and then we have, in addition to that, what's called *Nova* stun guns. *Ultron* stun guns. But all of those fit under the umbrella of electronic control devices.

Q Have you taught those courses to law enforcement officers?

A Both, including military as well.

[9] Q Could you explain briefly what the Defensive Tactics Institute is.

A The Defensive Tactics Institute again is a train the trainer type of firm where we train instructors. Our goal is to train instructors who then can go back to their respective law enforcement agencies and conduct in-house training or what we call in-service training. Some of the people we get—quite often we get police academy instructors who come through. We're very specialized.

For example, the Defensive Tactic Institute was the first training firm in the United States to develop a defensive flashlight course for law enforcement officers on the heavy duty flashlight such as the Maglite or the Kel-lite, those type of devices.

We also designed the first instructor program for handcuffing around the United States, which we called *Tactical Handcuffing*. We've done pepper spray, unarmed self-defense, a number of those things. So our goal is to provide instructor training so people can go back and then teach in their respective agencies, which is a lot more cost-effective for the agency.

Q What is your position with the Defensive Tactic Institute?

A President.

[10] Q As President, what is your role and responsibility?

A Very similar to the other institute; identifying some science relative to handcuffing or to impact tools or testing of batons, that type of thing. But then I also have written over 30 video scripts and helped produce 30 video information manuals, as we call them, on things such as the ASP baton that's made here in Appleton, Wisconsin. It's Armament Systems & Procedures, Maglites, handcuffing, handgun retention, handgun disarming, those types of things.

In addition to that, because we always include information on current legal cases, we also conduct limited legal research on that and acquire that information and share it with folks.

In addition to that, we also teach them how to train people and also evaluate them in the classroom and on the mat.

Q In your role with the Defensive Tactics Institute, have you designed any lesson plans or taught any courses dealing with the use of electronic control devices?

A Yes.

Q And can you describe that for me?

A Every manufacturer, each manufacturer has its own training program. Taser International has its own training program. CarbonArms has its own training [11] program. Nova Technologies has its own training program. What we do in the institute is we will take those various programs and try to synthesize the most important things from those into whatever we're going to be teaching.

In the case of Nova Technologies, with all its electronic restraint devices, whether it was a capture shield, which is a—looks like a riot shield with foil on the front that's electrified with batteries. We redesign the entire training program, wrote the entire new lesson plan, along with performance measures to quantitatively evaluate people.

With the taser material, some of the taser material that's currently out there regarding the collection and storage of cartridges and probes and those types of things, we found that if you follow the manufacturer's directive, that you were actually destroying evidence. So we altered that to bring it into more current times where that shouldn't happen. So that's basically what it is.

Q Have you taught courses regarding the actual use of the taser as well?

A Yes.

Q And to whom have you taught those courses?

A It varies. In June, we were with Wyoming Attorney [12] General's Office. We trained all their agents throughout the state of Wyoming. And part of that training involved showing the taser, demonstrating the taser, showing them how it worked, showing them how it fired, then showed them all the different parts of it. In other words, when a taser is discharged, inside the cartridge there's little, almost looks like confetti. They're called AFID, anti-felon identification circles, if you will, and they have the serial number of the cartridge embedded on them. So we showed them all that because they had no working knowledge at all of how tasers worked or anything else. So we took them through that whole training program.

Q Does that training program also include any discussion of when it's appropriate to use a taser?

A Always.

Q And does that training include training to—I think you touched on it, but if you can elaborate—law enforcement agencies?

A Yes.

Q Corrections agencies?

A Corrections. Military.

Q When was the last time you gave a presentation on the use of a taser to a law enforcement or corrections agency?

[13] A Two weeks ago in Peel Regional Police in Ontario, Canada.

Q You've touched on a number of different agencies in your answers to my questions. Can you just give us a sampling of the different law enforcement agencies you've taught courses to during your career?

A There's a bunch of them. Smith & Wesson Academy in Springfield, Massachusetts, which is mostly a handgun training firm. But we also did a lot of different courses up at Smith & Wesson; the Los Angeles Police Department; the California Highway Patrol; Seattle Police Department; Albuquerque Police Department; and Nevada POST, which was Peace Officers' Standards and Training. Many times we've gone to Carson City, long before I moved to Las Vegas, and did training there; state of New Mexico.

I've done training in every state in the United States but North Dakota. We've trained officers in North Dakota, but I personally have never set foot in North

Dakota. In Canada, we've been at the Laval Federal Correctional Institute outside of Montreal. I've taught in Quebec. I've taught Peel Regional Police. I've taught at the Vancouver British Columbia Police College. So we've been throughout Canada quite often, and as I explained, over in the United Kingdom.

* * *

[16] Q Have you ever been employed as a law enforcement officer?

A Yes.

Q And when and where?

A I was with the Northern York County Regional Police Department, which is the county next to Lancaster County, Pennsylvania. It's about 60 miles north of Baltimore, 30 miles south of Harrisburg, about 90 miles west of Philadelphia; gives you sort of a geographical area. I was a patrol officer there. I did routine patrol. We were a generalist in the sense that we could start a criminal investigation, but then it was turned over to the criminal investigator.

While there, I also held the title of self-defense specialist and conducted in-house training for the officers. From there, I went to the York County Sheriff's Department as a sworn deputy sheriff, and in that position, did prisoner transports, courtroom security, and worked through the Clerk of Court's office serving warrants, outstanding bench warrants, and any other warrant that would come into the county where we were looking for fugitives or whatever the case may be.

From there I went to the Braintree, Massachusetts Police Department in Braintree, Massachusetts, which is really the first big town on the south shore

going [17] toward the cape. It's where Routes 3 and 128 intersect. And there I held the position of staff executive, which was a civilian position. Its equivalent rank was that of deputy chief. But I also held a special, what's called a *special commission* in Massachusetts which was a sworn commission where I could make arrests, carry a handgun. I had the same powers as a Massachusetts state trooper. And in that position, I ran the Administrative Bureau, Director of Planning and Research in charge of the budget. All administrative things that the chief didn't want to do pretty much got handed to me. So I was in that position. So that was really the last law enforcement sworn position/civilian position that I had.

Q Thank you. You testified that you've taught courses regarding the use of the taser. Are you a certified taser instructor?

A Yes.

Q Have you published in the law enforcement corrections field?

A Yes.

Q Can you describe the general subjects of your published materials? I mean general.

A Probably the best way to describe it, I have about 196 publications as of last week. Some are in the area of use of force; some are in the area of policies and [18] procedures; some are in the area of self-defense type issues; some are in the area of recognizing behavioral signs for various medical emergencies; some deal with specific weaponry. For example, I've written several articles about taser devices and electronic control devices. So that's sort of a large grouping.

Q I want to focus now on your work in this case. When were you first asked to do work in this case?

A I believe it was some time in 2011.

Q And what were you asked to do?

A As I recall, I got a telephone call from your office asking me if I would be willing to review some documents in this case, which is my normal practice. Your office sent me some documents, I reviewed them, recontacted your office, and said I thought I could assist in the case.

I believe it was in December of that year I issued my first report in this case and then subsequently to that issued a supplemental report.

Q And you touched on it, but did you review any materials and develop any expert opinions you might have?

A Yes.

Q What materials did you review?

A For my initial report there were 17 various [19] documents, including four video disks, which included the complaint in this matter; various documents from the Monroe County Jail; the incident reports by Deputy Degner, Sergeant Hendrickson, Deputy Blanton, Deputy Manka and Lieutenant Conroy; shift logs; incident narrative report by Sergeant Hendrickson; Monroe County Supervisory Taser International Use Report; Monroe County Jail Inmate Major Violation Report on Michael Kingsley; deposition transcripts.

And then in addition to that when I wrote the report, I cited the various documents that are out there, including the Wisconsin Department of Justice

Advisory Committee recommendations for training on the electronic control devices, the Wisconsin DAAT Manual, various documents from Taser International.

Q And as a result of your review of these materials, have you formed any opinions about what happened in this case as an expert in the law enforcement corrections field?

A Yes.

Q Do you hold these opinions to a reasonable degree of professional certainty?

A Yes.

Q You mentioned the DAAT Manual as one of the materials you reviewed; is that right?

[20] A Yes.

Q Okay. Are you aware of what training manuals are used to train law enforcement and corrections officers in Wisconsin?

A Well, there are several. When it comes to the area of self-defense, handcuffing, those types of areas, the DAAT Manual is one of the primary devices known for correctional—or correctional officers have what is called the POSC, P-O-S-C Manual, which basically deals with prisoner and subject restraint which is a little more narrow and focused. Those would be the two that deal primarily with what we would call *defensive tactics*-type instruction.

Now in addition to that, throughout the academies of course you have the criminal code, motor vehicle code, officer safety things, but those would be the primary two for officer safety regarding handcuffing arrests, that type of thing.

Q And again, you mentioned the DAAT Manual. I want to direct your attention to Exhibit 524. Do you recognize this document?

A Yes. That is the—what's called the *DAAT Manual*. It's the Defensive and Arrest Tactics.

Q And again, you reviewed this document in connection with your review of the materials in this case?

[21] A Yes, that's correct.

Q Are you familiar with the term *active resistance*?

A Yes.

Q And are you aware of how Wisconsin training guides for corrections and law enforcement officers define active resistance?

A Yes. There's a specific definition in the documents that define active resistance for both corrections and law enforcement.

Q I want to direct your attention to page 41 of Exhibit 524.

MR. POSNANSKI: Your Honor, if we could publish this. I believe this has already been admitted into evidence.

THE COURT: 524?

MR. POSNANSKI: Yes.

THE COURT: It hasn't been admitted as a defendants' exhibit. Any objection to it?

MS. WARD: No, Your Honor. It's Plaintiff Exhibit 9, I believe.

THE COURT: Oh, all right. It's in as Plaintiff's Exhibit Number 9, so you can show it to the jury.

MR. POSNANSKI: Okay. Thank you.

BY MR. POSNANSKI:

[22] Q On page 141, do we find the definition of active resistance?

A Yes, we do.

Q And what is active resistance?

A The first paragraph introduces active resistance and makes a distinction between active and passive resistance. It says that active resistance involves the subject who is physically counteracting an officer's control efforts under circumstances in which the behavior itself, the environment in which the behavior occurs, or the officer subject factors create a risk of bodily harm.

The next paragraph talks about the criterion of active resistance or its threat means that in general, control devices would not be appropriate to use against verbal aggression or against people running away or against children or older persons unless reasonably justified based on the circumstances.

Q Okay. Is active resistance, is that concept unique to Wisconsin?

A No. It's a national concept.

Q You touched on it. Do you know whether this active resistance concept is consistent with how other states train their officers?

A Yes.

[23] MS. WARD: Objection. Relevance.

THE COURT: I'm sorry?

MS. WARD: Relevance objection.

THE COURT: Overruled.

THE WITNESS: This is consistent. Every state we go to we have to be aware of the various definitions for active resistance and passive resistance, and this is consistent with what we see nationally.

BY MR. POSNANSKI:

Q That first paragraph you read, it indicates the use of an electronic control device is appropriate to overcome active resistance or its threat?

A Yes, it would be.

Q So officers are trained that active resistances is sufficient justification for the use of a taser?

A Yes. Taser would be a device for active resistance. There's various what we would call levels of taser usage, so it could apply to a variety of active resistance patterns.

Q Based upon your review of the materials in this case, do you believe the officers were faced with active resistance?

A Absolutely.

Q Can you explain that?

A Reading the reports, the reports that I read [24] indicated the behavior of Mr. Kingsley. And the behavior of Mr. Kingsley, and I won't focus on all the behavior, but primarily became dead weight when they had to move him. Then they put him onto that bunk, basically the concrete bunk in the—I think it was receiving cell number 3. The video does show Mr. Kingsley sort of rearing up in this manner.

(Indicating) That's clearly active resistance. When you try to hold somebody down or hold them in place and they pull away, that would be active resistance.

So there's a number of times where you can watch throughout that video where Mr. Kingsley did offer the officers active resistance to which they had to then respond.

Q And as we saw, the definition of active resistance incorporates two concepts. You talked a little bit about the physical manifestations that Mr. Kingsley was, I guess, presenting the officers from your view of the materials. There's also an element of risk; is that correct?

A Correct.

Q And did you see from your view of the materials an element of risk to anyone?

A Well, there are several elements of risk, so yes, I saw several.

[25] Q And can you talk about that?

A In a correctional environment, any time you move prisoners there's some element of risk, albeit in most cases fairly minor. But in this particular case where we had active resistance, Mr. Kingsley was not cooperating in the removal of those handcuffs.

Now handcuff removal under the best circumstances is difficult. If I were to put my hands out like this and somebody just put handcuffs on them, coming in and getting that small key into the keyway and turning, that's going to take a moment or two. That's under the best of conditions. When you have somebody who's actively resisting and pulling against those cuffs, not only do you have to control the subject, but you also have to control the cuffs.

Now these were chain-style handcuffs. There's basically two types of handcuffs: *Chain*, which have this link chain going between the two handcuffs. And then we have what's called *hinged* handcuffs. Some of those had like a bicycle-type chain that allows the handcuff to fold, and others have like a barn door hinge, if you will. We didn't have that model.

So what we're really worried about in this case and what I was concerned about in this case, looking at the video, if you get your fingers—if a correctional [26] officer in the process of trying to uncuff that individual gets his fingers around the chain of that handcuff and the prisoner either intentionally or just inadvertently starts to move and your fingers get caught in the chain of that handcuff, high probability that's going to break the fingers, and in some cases, particularly in prisons, people are trained to take officers down using handcuffs. There's surveillance video of them practicing those techniques where you wrap the chain around the officer's fingers and jerk very quickly, which can amputate a finger or break a finger. That was one issue just in the removal of the cuffs. Because it's not simply putting the key in and turning it in one direction. If the handcuffs are double locked, you have to turn it one direction and then come back and turn it in the other direction. If they're not double locked, then you only turn it in one direction. But you're looking at a very small key going into a very small hole on the side or what's called the cheap plate of the handcuff.

The other issue is you have a confined area, and when you're in a very confined area—think about trying to manipulate somebody in your pantry. It's very difficult to do. So if the person rolls one direction or another, it could cause a correctional officer to [27]

strike his or her head against the wall. It could cause them to get injured with the concrete bunk, depending on what the prisoner did. If the prisoner was able to get up, might be able to kick or do something else to the officers.

And we also have the second part of this is the officers who are trained correctional officers have to also be aware of the risk to the prisoner because—

MS. WARD: Objection, Your Honor. This isn't in any of his expert reports.

THE COURT: I'm sorry?

MS. WARD: He's testifying outside his expert reports in this case. He didn't say anything about injury to the prisoner in either of his reports.

THE COURT: Sustained.

BY MR. POSNANSKI:

Q Based upon your training and experience, your review of the materials in this case, was the use of the taser in drive stun mode reasonable or unreasonable under the circumstances?

A In my opinion it was reasonable based on the circumstances.

Q Can you explain that?

A There was active resistance. The taser was used in what's called *drive stun mode*. D-r-i-v-e. Drive stun [28] mode is where you take the cartridge off the end of the taser. There's two contact points. They're 40 centimeters apart. And what you do is apply the contact points to a muscle mass. And it's designed under an umbrella, which is a common term in the law enforcement business called *pain compliance*. All it does is produce pain. It doesn't cause neuromuscular

incapacitation. If the device is shot, if the taser were shot in what's called *probe mode* and the probes go out and they're tethered back to the device, that causes neuromuscular incapacitation, which will cause the affected area to lock up.

This doesn't do that. This is just for pain compliance. It's localized. The recommended areas are large muscle masses, or in some cases if somebody had an arm underneath them and they were on their stomach, you could apply it to the tricep area of the arm to get the arm to come out.

Q Do you hold this opinion to a reasonable degree of certainty?

A Yes.

Q From your view of the materials in this case, are you aware that the plaintiff's expert, Brian Landers, has taken issue with the placement of Sergeant Hendrickson's knee on Mr. Kingsley in the receiving

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed: 11/05/12]

10-CV-832-BBC

MICHAEL KINGSLEY,

Plaintiff,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Defendants.

STENOGRAPHIC TRANSCRIPT OF FOURTH
DAY OF JURY TRIAL
HELD BEFORE DISTRICT JUDGE
BARBARA B. CRABB, and a jury

October 17, 2012
9:00 a.m.
Madison, Wisconsin

APPEARANCES:

For the Plaintiff:

Merchant & Gould
BY: EDWARD PARDON
WENDY WARD
JOEL GRAHAM
10 East Doty Street, Ste. 600
Madison, Wisconsin 53703

For the Defendants: Whyte Hirschboeck Dudek
BY: ANDREW JONES
TIMOTHY POSNANSKI
One East Main Street
Madison, Wisconsin 53703

* * *

[70] MS. WARD: Okay.

THE COURT: Okay. Then taking the post-trial instructions, first one is just the introduction.

Secret deliberations.

The need for a unanimous verdict, et cetera.

Then the burden of proof.

Preponderance of the evidence. I'll just keep going. If you have an objection, speak up.

Answers not based on guesswork.

Number of witnesses.

All persons equal before the law.

Impeachment by conviction of a crime. I believe the impeachment part, I think that raises questions.

Just the heading will be conviction of a crime.

MR. PARDON: Okay.

MR. JONES: So not impeachment by conviction of a crime.

THE COURT: Huh?

MR. JONES: I was trying to clarify what Your Honor had said. You mean take out impeachment by.

THE COURT: Right. I just think that's a little bit confusing in this instance. It explains in the instruction you may use that evidence; that is, that

he's been convicted of crimes, to help you decide whether his testimony is truthful and how much weight to [71] give to his testimony.

MR. JONES: So you're just talking about changing the heading.

THE COURT: Just the heading, yeah.

MR. JONES: No objection.

MR. PARDON: Could I make a suggestion?

THE COURT: Yes

MR. PARDON: I think that there was some back and forth about whether the evidence could be whether Mr. Kingsley had been convicted of a felony or six felonies and the way it say here, it says *convicted of crimes*. I'm wondering if it could just say convicted of a felony or just convicted. Because the evidence wasn't—

THE COURT: Convicted of a felony. Any objection to that?

MR. JONES: Well, given Your Honor's ruling about what was permissible, without waiving our earlier objection to that ruling.

THE COURT: All right. Then multiple defendants.

You must give separate consideration to each claim and each party.

Okay. And now the special verdict question we get into the definition of excessive force. And was this [72] what you put on the bench?

MS. WARD: Yes, Your Honor.

THE COURT: This is from the Seventh Circuit?

MS. WARD: Yes. Do you want me to address the question now?

THE COURT: Sure.

MS. WARD: Okay. So we would just like to request that the originally proposed post-trial jury instructions be used because we submit that there isn't a separate subjective element for the instruction for excessive force in the Seventh Circuit. There are a number of Seventh Circuit pretrial detainee failure to protect or conditions of confinement cases in which a separate determination of intent is articulated. In those cases, the necessary level of intent is deliberate, callous indifference and reckless disregard. However, in excessive force cases, the conduct will always be intentional. So there's a distinction between a failure to protect where, for example, a prisoner is beaten by other prisoners and then the level of intent comes into question because it's whether the prison officials, it accidentally happened on their watch or they egged it on, and that's when the level of intent becomes an issue.

But in an excessive force case, the conduct will [73] always be intentional. Indifference or disregard makes no sense. And in that respect, Your Honor, we submit that the way the jury instructions are currently worded is confusing.

In the Fourteenth Amendment context, excessive force is any force that is determined to constitute punishment, and the Seventh Circuit has squarely held in *Wilson v. Williams* that intent to punish can be inferred from the objective factors used to determine whether a use of force is unreasonable. That holding of *Williams* is set forth in the Seventh Circuit Pattern Instruction 708 and 709, which we provided to Your

Honor, and those are the instructions on which we based our proposed instructions.

In *Wilson*, the Seventh Circuit held that the trial court's jury instruction was not inappropriate in the Fourteenth Amendment context where that instruction stated the test was objective on reasonableness. That was the holding of *Wilson*.

The Court in *Wilson* also held that even if the test for excessive force is not wholly objective, the jury can rely on those objective factors to infer intent, and the fact that a separate subjective element isn't a part of the excessive force standard in the Seventh Circuit is also shown in pattern instruction 709, which [74] expressly states that "in deciding whether the defendant's use of force was unreasonable, you must not consider whether the defendant's intentions were good or bad."

And I want to draw the Court's attention to two additional cases that we also provided to Your Honor and those are *Titran v. Ackman* and *Davis v. Peoria County*. In *Titran*, the Seventh Circuit held that most of the time the propriety of using force on a person in-custody pending trial will track the Fourth Amendment. The court must ask whether the officials behaved in a reasonable way in light of the facts and circumstances confronting them.

In the *Davis* case that we provided to Your Honor, the Central District of Illinois analyzed the Seventh Circuit law on this issue and found that reasonableness is the key analysis for both pretrial detainees and arrestees. The court there referred to the intent element as just the intent to use force.

THE COURT: So, you have no objection to the proposal for No. 1, defendants used force on plaintiff.

MS. WARD: No. 1 of the special verdict?

THE COURT: I'm talking about—

MS. WARD: Oh, yes. Correct. Yes, Your Honor.

THE COURT: Then defendants' use of force was [75] unreasonable in light of the facts and circumstances at the time.

MS. WARD: Correct. We have no problem with that either.

THE COURT: Okay. So it's the third one. That defendants knew that using force presented a risk of harm to plaintiff but they recklessly disregarded his safety by failing to take reasonable measures to minimize the risk of harm.

MS. WARD: Right. And it's that that we submit is confusing. The *disregard of plaintiff's safety* is confusing in the context of an excessive force case where they were deliberately applying force.

So we would suggest eliminating 3, and also we had an argument for eliminating 4 as well.

THE COURT: I'm sorry, for eliminating?

MS. WARD: No. 4. The defendants' conduct caused harm.

THE COURT: Well, let's stick with No. 3.

MS. WARD: Sorry to jump ahead.

THE COURT: Mr. Posnanski.

MR. POSNANSKI: Yes, Your Honor. We would reiterate our request for the initial pretrial instruction we submitted on the excessive force issue. But to write intent completely out of the instruction I [76] think flagrantly violates what *Wilson* tells us. *Wilson*

specifically says the standard is neither wholly objective nor wholly subjective. Plaintiff wants to remove that subjective element in its entirety.

The language that *Wilson* specifically approved right from the middle of its discussion of the appropriate standard in an excessive force case involving a pretrial detainee states that "a plaintiff must prove the defendants acted deliberately or with callous indifference evidenced by an actual intent to violate the plaintiff's rights or reckless disregard for his rights." And then it goes on to cite two other Seventh Circuit cases with approval for the basis for that language.

I think this language properly instructs the jury to include the intent of the officers and provides them the appropriate parameters with which to assess the officers' intent. It doesn't come from the Wilson discussion of a prison security context, it's regarding the appropriate standard to evaluate excessive force brought by a pretrial detainee like Mr. Kingsley.

I think 3 should actually be bolstered with the actual language used by *Wilson* would be our position.

THE COURT: What would you propose?

MR. POSNANSKI: So it would read: The [77] plaintiff must prove defendants acted deliberately or with callous indifference evidenced by an actual intent to violate the plaintiff's rights or reckless disregard for his rights.

MS. WARD: Your Honor, can we respond to one point that Mr. Posnanski just raised?

THE COURT: Yeah. I'm just getting this in front of me so that I know what we're talking about.

MS. WARD: Okay.

THE COURT: Would you say that again?

MR. POSNANSKI: The direct quote is "Plaintiff must prove that defendants acted deliberately or with callous indifference evidenced by an actual intent to violate the plaintiff's rights or reckless disregard for his rights." And that's from *Wilson v. Williams* at page 875. It's 83 F.3d 870. That comes from page 875.

THE COURT: And Ms. Ward.

MS. WARD: For No. 3, I mean we agree that it is not wholly objective; that there is an intent element. But it's only the intent to use force. So we would not object to *defendants intended to use force*.

With respect to what Mr. Posnanski—I'm sorry, I'm going to butcher your name—just told the Court, what he quoted to you was not the holding of *Wilson*. It was, in fact, a quote of *Anderson v. Gutschenritter* [78] which the court was citing in *Wilson*, and *Anderson* is a failure to protect case. So that is exactly in line with what we just presented to the Court.

THE COURT: I want to look at *Wilson*. I'm really pretty much persuaded to give what I've already got, but I wanted to ask you, Ms. Ward, why do you think that we don't need an element about whether harm was caused to the plaintiff?

MS. WARD: Again, looking at the pattern instructions from the Seventh Circuit, yesterday the defendants in their Rule 50 motion, they argued that Mr. Kingsley was injured, and we submit that in the Seventh Circuit, injury isn't a required element of an excessive force claim. I think the use of harm is an element. Element would suggest to the jury that a lasting injury or a severe injury is required and that's not the law in the Seventh Circuit. There's a number

of cases and pattern instruction 708 that are directed exactly to this issue. And if they're going to argue that lasting injury is a requirement and then the instruction says harm, the jury thinks that that harm needs to be a lasting injury. If there's any suggestion that *de minimus* force or nonlasting injury isn't good enough, we would submit that would be an incorrect statement of the law. And in fact, in one of those [79] cases cited in the pattern instruction, the force used was a shove and a poke and the court said that was a sufficient injury to constitute harm.

THE COURT: Well, he has testified it was painful.

MS. WARD: Yes, Your Honor. If there was a clarifying instruction with *harm*, that pain is considered harm, we wouldn't have a problem with that. It's just the extent that they're going to argue and there will be any suggestion to the jury that some form of lasting injury is required under the law, that's what we would have the objection to.

Your Honor, Mr. Pardon just reminded me as well that it's confusing also with respect to the punitive damages standard.

THE COURT: I think I'll add "a person can be harmed even if he does not suffer a lasting injury or..."

MS. WARD: Or severe injury.

MR. POSNANSKI: Your Honor, I think the language used in *Wilson* says some harm. That was the instruction that was approved in *Wilson*. It certainly doesn't raise to the level of severe injury. That also comes from page 876 of *Wilson*.

THE COURT: So you're suggesting if I just said [80] "For the fourth element defendants' conduct caused some harm..."

MR. POSNANSKI: I think that would be appropriate. And then in addition to the factors that the jury is instructed to consider, one of those elements is the extent of the plaintiff's injuries. So they are instructed to take that into consideration.

From our perspective it's certainly not inappropriate to argue the extent of the plaintiff's injury. It's one of the elements of the case. It's one of the elements the jury is going to have to consider.

THE COURT: And the plaintiff can argue that, as I'm going to say, that a person can be harmed even if he does not suffer a severe injury. Okay. We'll stick with what I have with the addition of "a person can be harmed even if he does not suffer a severe injury."

And then the damages questions. Compensatory damages, anything about those?

MR. PARDON: Are you including or not including a statement about nominal damages?

THE COURT: I will. It's at the bottom of the paragraph on page five. "If you find in favor of plaintiff on Question No. 1, but find that he's failed to prove he suffered any compensatory damages, you should enter one dollar in nominal damages."

[81] MR. PARDON: Okay. We would ask that you not include that for the same reasons we had stated earlier, which is that it actually—it invites that outcome. There's already an instruction about the particular type of damages that we're asking for and we don't think it's necessary. So we're just renewing our objection.

THE COURT: Where did you have that, that proposal?

MR. PARDON: Originally in our objections to jury instructions.

THE COURT: Oh, in your objections.

MR. PARDON: Yeah.

THE COURT: What page was that? I'm having trouble finding it.

MR. PARDON: I'm sorry, page eight.

THE COURT: Page eight?

MR. PARDON: I don't have a docket number in front of me. Does Your Honor have our objections, our original objections?

THE COURT: I thought I did. Docket No. 117, Plaintiff's Objections to Defendants' Proposed Jury Instructions.

MR. PARDON: That sounds right, yeah. Page eight of that under B. It's the last part of the paragraph.

[82] THE COURT: Oh, I see. Okay. The jury can ignore any evidence of harm and instead split the—

MR. PARDON: Right, yes.

THE COURT: Okay. But that's what we're doing here. First of all we're asking the jury to find was there harm caused, and then asking them to consider in the damages portion what that harm amounted to. So I'm not sure—you say consider liability first and then consider damages and I think that's what we're doing.

MR. PARDON: I understand that. I just think that this instruction, within the context of damages, even suggests that they can go back and not find liability and split the baby. I'm sorry, that they can—they can suggest that they can say—it invites them not

to award an amount of damages, but just to say—when, in fact, they may otherwise have, because they don't need to be told they can use one. They can figure out one. I guess that's what I've been trying to say here. They don't need to be told you can award a dollar. I mean they can figure out that they can award a dollar.

THE COURT: If you want it out, I'll take it out, because I think it's something that's favorable to the plaintiff.

MR. POSNANSKI: We would request that it stay [83] in, Your Honor, because it's part of the standard instruction from 7.23 from Seventh Circuit pattern instructions.

MR. PARDON: All right. Leave it in.

THE COURT: We'll leave it in. Do you want the inserts—

MR. PARDON: Your Honor, I'm sorry. May I consult with my client for ten seconds?

THE COURT: Of course you can.

(Discussion off record at 10:54 a.m.)

MR. PARDON: Thank you, Your Honor. I apologize. You can leave it in.

THE COURT: Do you think we need the instruction on income taxes in this case?

MR. PARDON: No.

THE COURT: Defendants?

MR. JONES: I'm sorry. Just one second, Your Honor. I'm reading it again.

THE COURT: Sure.

(Pause at 10:54 a.m.)

MR. JONES: We're okay with taking it out.

THE COURT: Okay. And then if you'd look over the instruction on punitive damages.

MR. JONES: Just as a question, Your Honor. What we're looking at are the instructions that you [84] handed out to us, provided to us at the Final Pretrial Conference.

THE COURT: Right.

MR. JONES: Okay.

MR. POSNANSKI: We have no problem with the punitive damages instruction.

THE COURT: Okay.

MR. JONES: Without waiving, however, Mr. Posnanski's earlier motion.

THE COURT: Right. Any problem with the punitive damages?

MR. PARDON: No, Your Honor.

THE COURT: Okay. And then the final one is just selection of the presiding juror and communicating with the judge.

MS. WARD: No issues with that one.

THE COURT: Okay.

MR. POSNANSKI: We have no problem with that. We have two issues: One we'd like to raise and one we'd like clarification on.

THE COURT: Okay.

MR. POSNANSKI: We would request that the jury be given a limiting instruction concerning the

evidence of officers' compliance with training and policy. That comes from Seventh Circuit pattern instruction 7.04. [85] Given the evidence that came in in this case regarding whether or not the officers complied with or violated their training, I think it's appropriate to instruct them that compliance violation of that training is not a constitutional violation. The issue is whether the officers used excessive force on Mr. Kingsley.

We have a proposed instruction. It follows closely with the model instruction.

THE COURT: Why don't you bring that up to me.

MS. WARD: Do you have a copy? Thanks.

THE COURT: Thank you.

MS. WARD: Your Honor, this isn't exactly what's in the Seventh Circuit pattern instructions. I was just wondering if I could ask for clarification where they modified the pattern instruction from what was in—normally that's shown by marking it and there's no marking here. I'm not trying to be picky, I just want to know what they did to the Seventh Circuit pattern instruction.

MR. JONES: I believe Mr. Posnanski is marking as we're paused here. I don't think the intent was to materially change the instruction at all.

THE COURT: Okay.

MS. WARD: We don't think the instruction is needed. I mean even without seeing what the markings [86] were, the issue of whether they complied with their training is part of the totality of the circumstances, which I think is adequately instructed in the excessive force and unreasonable

force definition, especially the unreasonable force factors that the Court is providing already.

MR. POSNANSKI: Your Honor, the Seventh Circuit, this instruction is black letter law approved. I mean it's appropriate where plaintiff comes in arguing that, as we have here, the officers failed to comply with their training. The Advisory Committee comments "this instruction should be given if evidence was admitted at trial about compliance with the statute, rule or regulation." We have that.

Under the circumstances here, this instruction is appropriate to ensure there's no confusion that just because the officers may have training, they commit—they use excessive force.

THE COURT: I'm going to check—I'm going to check this out with the Seventh Circuit Handbook and see. Anything—you said you had one other thing?

MR. POSNANSKI: Yes, Your Honor. If we could just have clarification on what language is going to be added to the jury instruction regarding harm.

THE COURT: Oh, yes. Right. It is: "A person [87] can be harmed even if he does not suffer a severe injury."

MR. POSNANSKI: Thank you.

THE COURT: All right. I'll take these upstairs so we can get them amended and we'll resume at 11:15. We'll resume without the jury first.

(Recess 11:00-11:15 a.m.)

THE COURT: Okay. If you turn to page five—four, I inserted "a person can be harmed even if he did not suffer a severe injury." And then added the paragraph, "You've heard evidence about whether the

defendants' conduct complied with or violated their training..." And then "If you find the plaintiff has failed to prove any element of the excessive force claim..."

Anything else on instructions or verdict form?

MR. PARDON: No, Your Honor.

THE COURT: All right.

MR. JONES: There was just the one remaining issue about this Exhibit 512 and whether it should be redacted or not.

THE COURT: Oh, right.

MR. JONES: And I guess I would just take the position that I don't feel it's necessary to redact the exhibit or even appropriate. It went in without

* * *

PRINCIPLES OF SUBJECT CONTROL

A Training Guide for Jail and Detention Officers

[Seal]

Wisconsin Department of Justice

Law Enforcement Standards Board

June, 2009

[Exhibit 517]

* * *

INTRODUCTION

As a jail officer, you will have continuing contacts with inmates in your custody. Your main job is to supervise inmates to try to ensure their security and safety and to maintain good order and control in your facility. Your duties will require you to exert control over inmates by giving orders, directing their movement, disciplining them, and so on. Your goal is always to get inmates to comply voluntarily. If they do, you will have achieved your objective without making the encounter unnecessarily adversarial, and without risk of injury to officers, inmates, or others.

Unfortunately, even the best efforts of the most skilled officer to gain voluntary compliance do not always work. Sometimes you will have to use physical force to achieve control and accomplish your legitimate correctional objectives.

In Wisconsin, the trained standard for such use of force in a correctional setting (prison, jail or secure juvenile detention facility) is Principles of Subject Control (POSC). In POSC training, you will learn when and how to use verbalization skills and, if

necessary, physical force to control subjects. POSC techniques are psychomotor skills, meaning that they involve both the brain and the muscles. For that reason, you will spend much of your time practicing the verbal and physical techniques—learning the skills first in isolation, and then applying them in simulations.

POSC is the correctional application of Wisconsin's system of Defensive and Arrest Tactics (DAAT), which is the trained standard for use of force by law enforcement officers. The two systems are very similar in regard to their premises, concepts, and components. DAAT training is designed to train law enforcement officers to use force appropriately to accomplish legitimate law enforcement objectives in the environment in which they work, whereas POSC training is designed to train corrections officers to accomplish legitimate correctional objectives in the environment in which they work.

The definition of both DAAT and POSC is:

A system of verbalization skills coupled with physical alternatives.

This means that both law enforcement officers and jail officers are always expected to try to accomplish their objective of control through use of verbal skills whenever possible, and only to use physical force when the use of verbal skills either has not worked or would clearly be inappropriate in a given situation. Getting a subject to comply through talking is always preferable to getting a subject to comply through physical force, but there are times when physical force is necessary.

USE OF FORCE IN A CORRECTIONAL SETTING

You must know several key concepts to understand and properly apply the POSC system. These are listed in this section and discussed in greater detail in subsequent sections of this text.

The key concepts are these:

- Force may only be used to achieve legitimate correctional objectives
- Legal standards govern and limit the use of force
- In an institutional setting, the need for use of force may be reduced by various factors
- In Wisconsin, POSC is the basis for use of force in a correctional setting
- Corrections personnel must be able to articulate their use of force orally and in writing

This text explains the POSC system, use of which may involve just one officer or multiple officers. However, higher-risk incidents may require use of specialized teams.

A *Correctional Emergency Response Team* (CERT®) may be activated in a situation in which use of a specially trained team of officers is required to achieve a legitimate correctional objective. For example, CERT® personnel might be activated in a cell extraction situation or to respond to a disturbance involving a number of inmates.

Another type of specialized team, a *Special Weapons and Tactics Team* (SWAT), might be activated in a more serious emergency, such as a hostage situation, in which the application of deadly force may be required. SWAT members carry firearms, while

CERT® members generally do not. Both CERT® and SWAT require specialized training beyond basic POSC training.

PURPOSES FOR USE OF FORCE

As a corrections officer, you are authorized to use physical force to accomplish legitimate correctional objectives including ensuring security and safety and maintaining order and control. Legitimate objectives for use of force would include:

- to gain control of a resistive or combative inmate
- to defend yourself from physical assault
- to defend others (other officers, inmates, visitors, etc.) from physical or sexual assault
- to prevent inmates from escaping
- to move an unwilling inmate from one location to another
- to prevent an inmate from harming himself or herself
- to prevent destruction of property

If you use physical force against an inmate for a purpose other than one of those listed above, it might be considered inappropriate or excessive use of force. Examples of inappropriate purposes for use of physical force include:

- punishing an inmate for a violation of jail rules
- "getting back" at an inmate for something which he or she said or did
- giving an inmate a "message" that you are the authority figure

As noted, part of your job is to articulate your use of force, both orally and in writing. A key element of that is articulating the reason you used force. You have to be able to show that you used force for an appropriate reason—that your decision to use force was justified.

LIMITS ON THE USE OF FORCE

A number of legal standards govern and limit the proper use of force by correctional officers. These include the U.S. Constitution, Wisconsin Statutes, Wisconsin Administrative Codes, and agency policies and procedures. In addition, the training that you receive establishes a standard for the proper use of force. The following addresses each of these.

The U.S. Constitution

Inmates have certain basic constitutional rights. The application of constitutional rights to particular situations is determined by decisions of the federal courts, primarily the U.S. Supreme Court and the circuit Courts of Appeal. A basic constitutional right of all citizens, including inmates, is to be free from inappropriate or excessive use of force. This right arises out of various Amendments to the U.S. Constitution (see Appendix A).

Which amendment applies to use of force in a correctional setting depends on the custody status of the person:

- The Fourth Amendment standard applies to free persons, which would include persons arrested but not yet booked.
- The Fourteenth Amendment standard applies to pre-trial detainees.
- The Eighth Amendment standard applies to convicted inmates.

These standards are discussed in more detail in the next sections.

The Fourth Amendment. The first standard is the Fourth Amendment "objective reasonableness" standard. Any time force is intentionally applied to a free person, the force is considered a "seizure" under the Fourth Amendment. Therefore the force used must be objectively reasonable in light of the facts and circumstances confronting the officer at the moment the force is used. The objective reasonableness standard would apply to persons just off the street or in a holding area prior to booking.

The Fourteenth Amendment. The second constitutional standard is set by the Fourteenth Amendment's "due process" clause. The Fourteenth Amendment is violated by actions that "shock the conscience." Force intended in some way to injure, unjustified by any governmental interest, could rise to the level of conscience-shocking. The Fourteenth Amendment applies to pre-trial detainees rather than to sentenced inmates.

The Eighth Amendment. The third constitutional standard is the Eighth Amendment "cruel and unusual punishment" standard. Unnecessary and wanton infliction of pain and actions taken in bad faith, for no legitimate correctional or penal purpose would be considered cruel and unusual punishment. The Eighth Amendment standard applies to people who have been found guilty, convicted and sentenced to serve time in jail. Only convicted inmates are in jail as a form of punishment, which is the focus of the Eighth Amendment.

You may not know the custody status of the inmate with whom you are dealing, nor are you expected to

use force differently depending on the custody status of an inmate. For these reasons, the training standard used in POSC is the most restrictive of the three—the Fourth Amendment "objective reasonableness" standard. The following explains this standard in more detail.

Even when force is justified because it is used to accomplish a legitimate correctional objective, the level and amount of force used must be appropriate. The legal standard requires that the level and amount of force must be "objectively reasonable" under the particular circumstances. This standard originated in a 1989 decision by the U.S. Supreme Court in the case of *Graham v. Connor*.[1] This case had to do with use of force by law enforcement officers, but the standard applies to use of force by corrections officers as well. Essentially, this standard measures an officer's use of force by comparing it to actions that have been or would be taken by another officer with similar training in similar circumstances.

The legitimate purpose of your use of force is control, and control is a perception based on training, experience and the totality of circumstances in a particular fact situation. *Graham v. Connor* recognizes that situations vary, and sets forth several criteria to be considered in deciding whether a particular use of force was reasonable. These include:

- whether the person on whom force was used posed an imminent threat to safety
- whether the person was actively resisting or attempting to flee

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[1] 490 U.S. 386, 109 S. Ct. 1865 (1989)

- the severity of the alleged crime at issue

If a use of force comes to trial, the courts generally examine the following questions:

1. Was there a need for force in the first place to accomplish a legitimate correctional objective?
2. If the use of force was appropriate, was the amount and type of force used appropriate in the particular situation?
3. If the use of force was inappropriate or excessive, was it so great that it violated the Constitution or state law?

In the past, an inmate had to prove that he or she received a significant injury as a result of the force in order to win a lawsuit alleging a violation of constitutional rights. However, in a 1992 ruling, the U.S. Supreme Court revised that standard. In *Hudson v. McMillan*,[2] the Court ruled that an inmate need not prove that he or she suffered significant injury—only that he or she suffered "wanton and unnecessary infliction of pain." The Court also said that when force was used "maliciously and sadistically for the very purpose of causing harm" rather than "in a good faith effort to maintain and restore discipline," such force could be deemed excessive. In other words, if a jail officer uses force for a reason unrelated to a legitimate correctional objective, that force could violate the inmate's constitutional rights—regardless of whether the inmate was injured.

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[2] 503 U.S. 1, 112 S. Ct. 995 (1992)

Wisconsin Statutes

Several Wisconsin statutes address the issue of use of force, including in correctional setting.

Misconduct in Public Office (§946.12 Wis. Stats.) covers actions by all public sector employees. Certain categories of misconduct could apply to inappropriate uses of force:

- failing to perform a ministerial (non-discretionary) duty within the time or in the manner required by law
- exceeding lawful authority or acting in a way forbidden by law
- exercising a discretionary power in a way inconsistent with one's duties or the rights of others with intent to obtain a dishonest advantage
- intentionally making a false entry in an official record

For example, if an officer intentionally used excessive force (exceeding lawful authority), or refused to follow agency policy on use of force (failing to perform a ministerial duty), or intentionally falsified a use-of-force report (false entry in an official record), that officer could be found to have violated the provisions of this law.

Abuse of Residents of Penal Facilities (§940.29 Wis. Stats.) reads in part:

"Any person in charge of or employed in a penal or correctional institution or other place of confinement who abuses, neglects or ill-treats any person confined in or a resident of any such institution or place or who

knowingly permits another person to do so is guilty of a Class 1 felony."

This law applies to people who work in state prisons, county jails, and secure juvenile detention facilities, among others. It reinforces the concept that use of force is only to be used to achieve legitimate correctional objectives. Inappropriate use of force could constitute "abuse" under the provisions of this law.

Note that a jail officer who uses inappropriate or excessive force against an inmate could be held both criminally and civilly liable for the same offense. The officer's actions could result in a criminal conviction under §940.29 Wis. Stats., *and* civil liability for violating an inmate's constitutional (civil) rights.

Note too that §940.29 Wis. Stats., prohibits knowingly permitting someone else to abuse, neglect, or ill-treat an inmate or other person. If you observe another officer using physical force inappropriately or excessively, you have a legal obligation to try to stop it. This duty is based on the concept that there are "no innocent professional bystanders"—once you arrive on scene, you have a duty either to assist with what is going on (if it is legitimate) or stop it (if it is not legitimate). If a use of force is legitimate but being carried out incorrectly or excessively, you have a duty to step in to fix it, make the technique better, or stop it. Your duty to act also takes into account the concept of "contact officer override," which holds that an officer has a duty to intervene with the inappropriate or unlawful actions of peers or supervisors.

Law Enforcement Officer: Failure to Render Aid (§940.291 Wis. Stats.)[3], requires you to provide or make arrangements for first aid to anyone in your custody who is in need of it. As with §940.29 Wis. Stats., it also prohibits knowingly permitting someone else to withhold needed first aid. Clearly this law requires that you provide necessary care to an inmate or other person following a use of force. As you will see, provision of first aid is part of "Initial Medical Assessment," which is one of the steps in the First Responder Philosophy, one of the fundamental concepts behind POSC.

Technically, this law only applies to "peace officers." In a jail or detention setting in Wisconsin, that would include deputies working in the facility, but not civilian employees. However, the same principles apply to all corrections officers, sworn or civilian.

Wisconsin Administrative Code

DOC 350.14 Wis. Adm. Code specific requirements regarding use of force. The section reads as follows:

1. *Jail staff may use physical force against an inmate only if force is necessary to change the location of an inmate or to prevent death or bodily injury to the staff member, the inmate or someone else, unlawful damage to property or the escape of an inmate from the jail. Staff may*

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[3] This statute reads in part, "*Any peace officer, while acting in the course of employment or under the authority of employment, who intentionally fails to render or make arrangements for any necessary first aid for any person in his or her actual custody is guilty of a Class A misdemeanor if bodily harm results from the failure. . A violation for intentionally failing to render first aid under this subjection applies only to first aid which the officer has the knowledge and ability to render.*"

only use the amount of force reasonably necessary to achieve the objective for which force is used. Corporal punishment of inmates is forbidden.

2. *Any staff member who has used force to control an inmate or inmates shall submit a written report to the sheriff, jail administrator or the staff member's immediate supervisor describing the incident. The report shall include all relevant facts."*

Note that the requirements under Part 1 of this section mirror the basic constitutional requirements discussed earlier.

Agency Policy and Training

Policy. Your employing agency has a comprehensive set of written policies and procedures that describe how correctional officers are expected to carry out their duties and responsibilities—including with regard to use of force. Your agency's policy may be *more* restrictive than Wisconsin law or Administrative Code, but it cannot be *less* restrictive. You need to know your agency's policies on use of force and always try to act according to such policies. Not only do your policies indicate what your employer wants you to do, but they also provide protection in the event of a civil lawsuit.

If you are acting within the scope of your employment, you are indemnified against individual liability in the performance of your duties, according to provisions of Wisconsin law under §895.46 Wis. Stats., *State and Political Subdivisions Thereof to Pay Judgments against Officers*. If someone brings a lawsuit against you for a use of force incident, as long as you were acting within the scope of your

employment, the county—not you—will face the liability. You will not have to hire a lawyer or pay any money damages that arise from the lawsuit.

On the other hand, if you act outside the scope of your employment (defined in part by policy) you could face individual civil liability. If someone brings a lawsuit and you lose, you (or your insurance company) could have to pay the judgment.

Your agency's use of force policy most likely also addresses use of force reporting. It may indicate the specific report form(s) to be completed following a use of force incident, when such reports are to be completed, where they are to be routed, and so on. Again, know and follow these policy requirements as carefully as possible. In the event of a lawsuit, your use of force report will be crucial because it is your formal justification of the actions taken during a use of force incident.

Training. POSC is the standard for basic (recruit-level) use of force training for jail officers and secure juvenile detention officers in Wisconsin. Remember that the standard established by the U.S. Supreme Court in *Graham v. Connor* is that force must be "objectively reasonable" in order to be legally justified, and that such reasonableness is generally measured against what another officer with similar training would do in similar circumstances. In Wisconsin, POSC is the state-approved standard for training. That means your actions in a use-of-force incident will be measured against what you learned to do in your POSC training. In a lawsuit, POSC trainers may be called upon to serve as witnesses—to review what happened in a use-of-force incident and if qualified as an expert, to give an opinion about whether or not officer actions were in accordance with POSC concepts

and techniques. If expert witnesses feel that an officer's actions *were* in accordance with what was taught in POSC, then it is easier to show the reasonableness of the use of force.

From a liability risk management perspective, the best thing, of course, is for an officer to apply trained POSC techniques exactly as learned during training. However, that is not always possible or feasible. Fortunately, the legal system recognizes that fact and takes it into account in judging use-of-force actions by law enforcement or corrections officers. Thus, use of force by an officer may be legally justifiable in one of three ways:

- It is a trained technique applied just as trained
- It is a dynamic application of a trained technique
- It is a technique not trained but justified under the circumstances

In some circumstances, you can apply a technique learned in POSC just as you were trained to do. Your execution of the technique mirrors the classroom model. Often, however, that is not possible because the situation is rapidly changing. As a result, the force used is a variation of some sort of the trained tactic or technique—close, but not perfect. For example, in a dynamically evolving situation involving an unarmed strike, you may not have been able to strike the specific trained target area, despite your best efforts to do so.

In some circumstances, you may end up applying a force tactic that you were never trained to do. While it is certainly preferable always to use trained techniques, there may be times when a non-trained technique is justifiable. For example, if a jail officer is

being assaulted by a group of inmates, that officer may have to use any available object, such as a radio or a flashlight or a piece of furniture, to defend himself or herself. Use of such objects is not trained in POSC, but the officer's use of them might be legally justified because he or she was acting in self-defense and a tactical evaluation dictated a level or amount of force that was not available via trained technique.

Aside from basic (recruit-level) training, you may receive use of force training within your agency, or sponsored by your agency. Such training may or may not be based on the POSC system. If not, then such training also establishes a legal standard to which you may be held.

FACTORS INFLUENCING THE USE OF FORCE

There are a number of factors that may influence the use of force in a correctional institution, such as a jail. These factors may mean that application of force may not be necessary—at least immediately—or, if force is necessary, may influence the level and amount of force needed to establish control. These factors include the following:

- *The need for physical force may be reduced in a controlled environment.* Officers in a jail or detention setting control the physical environment. They control physical access to the facility, and also control the items that inmates are allowed to possess. Thus, if good security measures are followed, it is less likely that inmates will have access to weapons or other potentially-dangerous items.
- *Background information on inmates aids in classification and may prevent use of force incidents.* This allows jail staff members to

identify potentially violent or otherwise troublesome inmates and to house them in areas of the jail where it is easier to minimize problems and to more effectively supervise them.

- *The physical design of a facility may aid in the isolation of problem areas.* If there is a disturbance emergency, the physical environment of a jail makes it easier to close off (isolate) areas where such emergencies are occurring (such as cells, cellblocks, dayrooms, dorms, pods, etc.), thus containing the problem area until adequate help can arrive to deal with the situation effectively.

- *Use of verbalization skills in the controlled environment of a jail often defuses situations, so that physical confrontations may be unnecessary.* Proper use of Correctional Professional Communication Skills is very important in a jail or detention setting. Verbal communication should be used whenever possible to gain or regain control, rather than physical force. This is often more feasible in a jail than it is on the street. Sometimes, verbalization may include an implied to use force, as discussed below. Verbalization will not always work to gain or regain control, but should always be tried first.

- *Surveillance technology aids in early detection and suppression of situations that require the use of force.* The use of cameras, intercoms, and other monitoring devices allows staff the opportunity to detect possible problems early, and to assist in getting help to the scene in a timely manner. Such technology may also assist

in properly documenting incidents. Closed-circuit televisions, of course, are only useful if someone is watching the monitors carefully.

- *Multiple officer response, when available, can minimize the need for use of force options.* Correctional disturbance emergencies can often be handled using a team response. In many cases, the application of physical force can be avoided through use of a "show of force" by officers. Or, when force is needed, a team response may mean that use of less intrusive physical control tactics are possible.

- *There is often the ability to control some situations with a threat of force, aside from multiple officer response.* If an inmate does not comply with an order or directive, a threat of force or implied threat of force may be effective to get the inmate to comply. As noted, multiple officer response is one type of "show of force." But there are other types of threat as well. For example, if an inmate sees that an officer has O.C. aerosol spray or an electronic control device, the implied threat that such weapons will be used may be enough to gain the inmate's compliance. An inmate may posture before submitting. Using actual or implied threats might be appropriate when you do not need to immediately intervene with application of force. Of course, you must have the capacity to follow through on any threat or implied threat to use force.

- *The ability to wait out potential violent confrontations and control the moment of initial contact may reduce the need for physical force options.* There are some situations in which

immediate intervention is necessary, but there are many situations in which that is not the case. For example, if an inmate refuses to exit a cell or room, you do not always need to immediately perform a cell extraction. If the inmate is locked in the cell, you may be able to give him or her time to think about it. If there is no immediate peril or danger, use of force can sometimes be avoided or at least be delayed.

- *In a correctional institution, rule violations result in disciplinary action rather than an arrest process, which often leads to physical confrontations.* Inmates are already in custody, so arrests are not an issue. Disciplinary procedures to deal with inmate behavior can be done in a less stressful, less immediate, and therefore less dangerous manner. If the jail's disciplinary system is fair and consistent, inmates are more likely to comply with rules.
- *It is often possible to seek supervisory advice or intervention before actually using force.* In many situations in a jail setting, there is time to seek the input and/or assistance of a supervisor before applying force. A supervisor may be in a better position to determine the need for use of force at all, or may be authorized to determine the appropriate level of force to use if force is necessary. Again, this is a factor *if* there is time to seek such assistance, in a given situation.

Knowing these factors influencing the use of force is important for you in order to understand proper use of force in a jail or detention setting. This is because, as noted above, the factors listed may limit the need for application of physical force or they may mean that a

lesser level and amount of force is required in order to achieve a legitimate correctional objective.

This material is based on an article by Gary T. Klugiewicz, "Factors That Influence the Use of Force in a Correctional Institution," that appeared in *CorrectionsOne News*, February 4, 2008.

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INTERVENTION OPTIONS

The second phase of Disturbance Resolution is Intervention Options. These are the trained POSC techniques. Much of your POSC training is devoted to learning these. The intervention options are divided into five modes as shown:

INTERVENTION OPTIONS

MODE	PURPOSE
Presence	To present a visible display of authority
Dialogue	To verbally persuade
Control Alternatives	To overcome passive resistance, active resistance, or their threats
Protective Alternatives	To overcome continued resistance, assaultive behavior, or their threats
Deadly Force	To stop the threat

These five modes are the main force option categories. Each mode includes specific tactics and techniques that you will learn. If your initial approach to a disturbance emergency situation in your jail or detention facility leads you to decide to intervene, Intervention Options provides you with a range of possible responses. Each of the five modes listed reflects the need for an increasing level of control.

Remember that POSC is defined as a *system of verbalization skills coupled with physical alternatives.* This means that if possible, it is always preferable to accomplish the objective of control through the first two modes—*Presence* and *Dialogue*—which do not involve application of physical force. Using these modes is always desirable, because it significantly lessens the chances of anyone getting hurt, minimizes

stress for everyone, and also minimizes the risk of litigation. The part of the POSC definition that says "coupled with physical alternatives" implies that you will use physical force when verbalization skills have either not worked or would clearly be ineffective.

However, you do not have to start with the lowest level of control—*Presence*—and try that first, and then if that does not work escalate to the next level—*Dialogue*—and then if that does not work escalate to a *Control Alternative*, and so on. You can move from one mode to another as you deem appropriate, based upon your tactical evaluation. You are authorized to use the level and amount of force that is reasonably necessary to control a subject. Depending on the circumstances, it may be appropriate to escalate quickly through the modes or to skip modes, based upon your tactical evaluation.

To illustrate this concept, suppose that a large inmate suddenly assaults you. You have no chance to try to control the situation with dialogue or to use escort holds or to decentralize the inmate. Instead, you would probably block the assault and then use a forearm strike and perhaps a knee strike, and take the inmate to the ground.

To understand this more clearly, remember the basic concepts which were discussed earlier, under The Control Theory:

- Officers must maintain a position of advantage.
- Proper police action balances safety and efficiency.
- An officer is always permitted to disengage and/or escalate in order to take proper police action.

- Once control has been established, you must reduce force to a level sufficient to maintain control.
- Control is a perception based on an officer's training and experience and the fact situation.

Each of the five modes under Intervention Options serves a different purpose. Following is a discussion of each of the modes and its purpose, along with a brief description of the tactics and techniques within each mode. The specific steps of each of the POSC techniques are found in Appendix D.

PRESENCE

The first mode, *Presence*, reflects the fact that sometimes all that is needed to control a situation is the presence of one or more officers. The purpose of this mode is: *to present a visible display of authority*.

If inmates see an officer (or more than one), that alone may persuade them to comply—either because they respect authority or because they do not want to suffer the consequences of escalated force beyond officer presence. Presence often conveys an implied threat of escalation of force if compliance is not forthcoming.

A specific form of officer presence involving a clear threat of escalation of force is often referred to as a "show of force." This usually involves several officers gathered together at the site of a disturbance emergency, sometimes with equipment to control the situation. For example, if an inmate refuses an order to exit his or her cell, an option is for multiple officers to stage outside of the cell. The inmate knows that he or she cannot win in the face of such odds, and voluntarily exits the cell. The "show of force" has been

successful because the situation is resolved—control has been achieved—and no one has been hurt.

For an officer's presence to be effective, it must convey authority and readiness to act. This is referred to as *command presence*. Command presence is conveyed by your *stance*, which refers to the way you stand, your posture, and the position of your hands. Not only does a proper stance convey a message to a subject, but it also puts you in the best position to react properly should the need arise.

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interests and those of your fellow staff members. Your job is to do what you need to do to control people and situations as quickly and efficiently as possible—not to unnecessarily make things worse than they are and cause further problems.

The other side of the coin is that subjects with whom you are dealing (e.g., inmates or visitors or others) can do those same things to you—that is, say things or do things that will provoke you. Just as you must try not to unnecessarily provoke other people, you must also not let others provoke you. You must learn to deal with provocations from others in a professional manner, and not get angry or escalate to a physical confrontation. You need to know your "hot buttons"—those that others can push to try to provoke you, and know how to avoid letting them provoke you. This is not necessarily easy, but it is part of your job as a professional.

CONTROL ALTERNATIVES / PROTECTIVE ALTERNATIVES

Control Alternatives is the third mode in Intervention Options. The purpose of this mode is *to*

overcome passive resistance, active resistance or their threats. Active resistance is behavior that physically counteracts an officer's attempt to control, and which creates risk of bodily harm[17] to the officer, subject, or other person.

Protective Alternatives is the fourth mode in Intervention Options. The purpose of this mode is to *overcome continued resistance, assaultive behavior, or their threats*.

Several tactics may fit either into Control Alternatives or Protective Alternatives, depending on the situation. Which mode any of these tactics fits into depends on the totality of the circumstances in a given use-of-force situation. A particular tactic may qualify as a Control Alternative in one situation because of the purpose for which it is used. But that same tactic may, in a different use-of-force situation, more properly qualify as a Protective Alternative because of why it is being used in that situation. Here are a few examples to illustrate this point:

- A focused strike is a type of what are called *Active Countermeasures*. Active Countermeasures are generally classified as Protective Alternatives. However, an officer may use a focused strike (such as a knee strike to the back of the leg), to "distract" a passively-resisting inmate who is locking up his or her arm to try to prevent the officer from establishing a wrist lock. Use of this focused strike in that situation would be a Control Alternative because it is being used to "overcome passive resistance. . ." If the officer

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[17] "Bodily harm" is defined in Wisconsin statutes (§ 939.22[4] as " . physical pain or injury, illness, or any impairment of physical condition."

can get the inmate to stop resisting, he or she can establish the wrist lock and gain control.

- Use of a baton is generally classified as a Protective Alternative. However, in a crowd-control situation, an officer may use a baton to direct an inmate into a specific area. Use of the baton in this way would be considered a Control Alternative because the purpose of using it is to "overcome... passive or active resistance. . ." By using the baton in that way, the officer is attempting to gain control quickly so as to avoid having to escalate to using the baton to strike the inmate. Use of a baton as an impact weapon would be a Protective Alternative because it would meet the stated purpose for that mode.

Nevertheless, certain tactics are usually best classified as Control Alternatives because they generally fall under the stated purpose for Control Alternatives, while others are usually best classified as a Protective Alternative because they generally fall under the stated purpose for Protective Alternatives.

The following tactics are usually categorized as Control Alternatives:

- escort holds
- compliance holds
- OC aerosol spray
- electronic control devices (ECD's)
- passive countermeasures

The following tactics are usually categorized as Protective Alternatives:

- active countermeasures

- incapacitating techniques
- intermediate weapons

The next section discusses each of these tactics. Specific instructions for applying the techniques are found in Appendix E.

Escort Holds

The purpose of escort holds is to *safely initiate physical contact*. If a subject does not comply with your verbal directions, you can use an escort hold to gain control of him or her, preventing a physical confrontation. An escort hold also enables you to move the subject in a controlled way.

Compliance Holds

The purpose of compliance holds is *to overcome passive resistance*. Passive resistance means that the subject physically resists your efforts to move him or her—but not by actively fighting with you. You might, for example, move directly to a compliance hold if you have tried to use an escort hold on an inmate and he or she physically resists that attempt.

Oleoresin Capsicum (OC) Aerosol Spray

Oleoresin capsicum is an inflammatory agent that is a mixture of an oily resin and a naturally occurring essential oil derived from varieties of the red pepper plant. It is generally prepared in aerosol form, in various concentrations. It works by creating in a subject a variety of physical effects that may result in confusion and disorientation, thus disrupting the subject's ability to continue to resist. OC affects people in various ways, including these effects:

- pain and tearing in the eyes, causing involuntary closing or rapid blinking

- reddening of affected skin (usually the face), combined with a feeling of intense heat
- inflammation of the mucous membranes of the nose, eyes ,mouth and throat
- if inhaled, coughing, gagging, and gasping for breath

Because of the effects on the eyes and breathing, subjects may panic, fearing that they are being blinded and/or suffocated. Typically, the hands will go to the face, the upper body will bend forward, and the person may go to his/her knees for increased stability. Other subjects may run.

Although the effects can be very intense, they generally subside within 30-45 minutes. The effects also vary with different people. Some people are incapacitated, others affected very little.

Additionally, some people, including those who are impaired by alcohol or drugs, mentally ill, emotionally disturbed, or highly motivated, may not be affected much or at all. Even those who experience the physical effects may have the mental toughness to fight through them. If your use of OC is not effective in assisting you to gain control, you must be ready to disengage and/or escalate.

Whether or not OC spray is used in a particular jail or detention center, it is highly likely that jail or detention officers will receive subjects who have been sprayed during an arrest and brought to jail for custody. Such subjects may be experiencing the after-effects of use of OC spray, requiring that you apply appropriate after-care procedures. These procedures are specified in the section of this text called Follow-Through Considerations. See also Appendix E.

Electronic Control Devices (ECDs)

Electronic Control Devices (ECDs) include stunning devices, such as the Taser® brand and stun shields. These and similar devices are used in a number of jails and detention facilities.

One of the benefits of ECDs (as well as OC spray), is that they are often effective at deterring inmates from further inappropriate behavior or failure to comply. Inmates will often comply when they see that an officer has OC or an ECD available and is ready to use the device, because they do not want to be subjected toward the painful experience of having the device used on them. In this way, control devices can often be used as a "show of force" thereby minimizing need for actual application of force.

Passive Countermeasures

The purpose of passive countermeasures is: to *decentralize* a subject. The term "decentralize" means to direct a subject to the ground.

It is appropriate to use passive countermeasures if you reasonably believe that you will be unable to achieve control with the subject standing. For example, if a subject continues to violently resist even while you apply a come-along hold, Preventing you from achieving control and applying handcuffs, you may decide that it is appropriate to decentralize the subject to achieve control. Once a subject has been decentralized, you must take appropriate action to stabilize and handcuff the subject, disengage, or escalate.

Decentralizations may be needed in a variety of situations and from a variety of positions.

The POSC training you receive includes four techniques for decentralizing a subject:

1. Secure-the-head decentralization
2. Hug-yourself decentralization
3. Lower-your-center decentralization
4. Pull-in / push-down decentralization

Any decentralization tactic used must allow you to follow two critical guidelines to minimize the chance of injury to the subject:

- Protect the subject's head and neck as much as possible
- Control the speed of the subject's descent.

Decentralizations that do not follow these guidelines might be considered excessive force.

Active Countermeasures

Active countermeasures are unarmed blocking and striking techniques. Their purpose is *to create dysfunction* in an actively resistive or assaultive subject, by causing fluid shock waves that temporarily disrupt a subject's ability to resist. The goal is to interrupt the subject's resistance, enabling an officer to direct the subject to the ground for stabilization, handcuffing, and other follow-through procedures.

Active countermeasures include

- Basic blocks
- Vertical stun
- Focused strikes

Basic blocks help protect you from incoming strikes. Effective blocking of hand or leg strikes permits you to disengage temporarily or escalate to an appropriate

intervention option. You must be able to block strikes from various heights.

Vertical stuns are useful in close quarters confrontations when you are grappling with a subject and have a suitable flat, sturdy, vertical surface, such as a wall, nearby. When you use a stun, you attempt to create temporary dysfunction of the subject's respiratory system and/or mental processes by forcefully directing the subject's torso into the wall or other vertical surface. The disruption to the subject is short-term—five to seven seconds—during which you can take other appropriate action, such as disengaging, decentralizing the subject for ground stabilization, or escalating to a higher level of control, as needed.

Focused strikes are intended to create dysfunction and disrupt the subject's ability to continue resistive or assaultive behavior. Unlike stuns, however, the impact is not spread throughout the subject's body, but is instead focused on a particular target area of the subject's body. (See APPENDIX F for these target areas.)

Good use of body mechanics will enhance the effectiveness of active countermeasures. When you use active countermeasures, you should use your whole body to your advantage. Here are some basic principles:

- Stay balanced. If you over-extend your stance or reach for your target, your strike will lose energy.
- Move into strikes when possible, taking care to re-adjust your stance as needed, and maintain balance throughout the confrontation.

- Rotate your hips in the direction of the strike to add power, being sure that your front foot is oriented to allow full rotation.

Incapacitating Techniques

The purpose of incapacitating techniques is *to cause the immediate, temporary cessation of violent behavior.*

The only technique within this tactic is the *diffused strike*. This is a non-focused strike delivered from a trained distance applied to create fluid shock waves to the base of the subject's neck, an area that is the origin of the brachial plexus of nerves. The diffused strike may be applied from the front or rear. Like the vertical stun, the diffused strike disrupts nerve impulses to the brain. Unlike the vertical stun, however, the effect is usually greater, rendering the subject temporarily unconscious.

Remember that once a situation has been stabilized after the use of force, initial medical assessment must be initiated, as set forth and trained in The First Responder Philosophy.

Intermediate Weapons

The purpose for using intermediate weapons is to *impede a subject*, preventing him or her from continuing resistive, assaultive, or otherwise dangerous behavior.

Intermediate weapons include a variety of impact and other weapons designed to impede subjects. Within the DAAT system, the only trained tactic within intermediate weapons is use of batons. Use of batons, however, is not a trained tactic In the POSC system. Thus, jail and detention officers are not trained in the use of any specific intermediate weapon in basic training. Some jails and detention centers,

however, do include training in use of the straight baton in their in-service or specialized training programs.

DEADLY FORCE

Deadly force is the fifth mode under Intervention Options. The purpose of deadly force is *to stop the threat.*

To understand the appropriate application of this force mode, you must know both the *definition* of deadly force and the *justification* for use of deadly force, under both the DAAT and POSC systems.

The definition of deadly force is:

> *"The intentional use of a firearm or other instrument, the use of which would result in a high probability of death."*

The justification for use of deadly force is as follows:

> *"Behavior which justifies your use of deadly force is that which has caused or imminently threatens to cause death or great bodily harm to you or another person."*

The definition of deadly force and justification for such force are important because they are related to the purpose for the deadly force mode. Remember that the purpose is *to stop the threat*—not to kill a person. Even though death may well be the result of the application of deadly force, death is not the intent. The intent is to *stop* a subject who is displaying behavior "which has caused or imminently threatens to cause death or great bodily harm to you or another person." In other words, you must stop the subject right now in order to prevent death or great bodily harm to you or another person, and your tactical evaluation indicates that deadly force is justified. But it is *stopping*, not

killing, that is the intent. That is an important distinction.

Within the DAAT system, there is only one trained tactic within the mode of deadly force, the use of firearms. However, use of firearms is not trained in the POSC system. Thus, jail and detention officers are not trained in application of any deadly force tactics. If firearms are used in a jail, it would generally be in the context of a response by a trained specialized team.

This does not mean that you cannot use deadly force in a jail or detention facility. If the justification exists, you can use deadly force. But you will not be doing so on the basis of tactics learned in POSC. Instead, your use of such force would fall into the category of legally justifiable use of force that is *not trained but is justified under the*

* * *

[Filed: 10/18/12]

II. POST-TRIAL INSTRUCTIONS

Introduction

Ladies and Gentlemen of the Jury:

Now that you have heard the evidence and the arguments, I will give you the instructions that will govern your deliberations in the jury room. It is my job to decide what rules of law apply to the case and to explain those rules to you. It is your job to follow the rules, even if you disagree with them or don't understand the reasons for them. You must follow *all* of the rules; you may not follow some and ignore others.

The decision you reach in the jury room must be unanimous. In other words, you must all agree on the answer to each question.

Your deliberations will be secret. You will never have to explain your verdict to anyone.

If you have formed any idea that I have an opinion about how the case should be decided, disregard that idea. It is your job, not mine, to decide the facts of this case.

The case will be submitted to you in the form of a special verdict consisting of 4 questions. In answering the questions, you should consider only the evidence that has been received at this trial. Do not concern yourselves with whether your answers will be favorable to one side or another, or with what the final result of this lawsuit may be.

Note that certain questions in the verdict are to be answered only if you answer a preceding question in a certain manner. Read the introductory portion of each

question very carefully before you undertake to answer it. Do not answer questions needlessly.

Burden of Proof

When a party has the burden to prove any matter by a preponderance of the evidence, it means that you must be persuaded by the testimony and exhibits that the matter sought to be proved is more probably true than not true. On the liability questions in the special verdict, the burden of proof is on the party contending that the answer to a question should be "yes." You should base your decision on all of the evidence, regardless which party presented it.

Answers Not Based on Guesswork

If, after you have discussed the testimony and all other evidence that bears upon a particular question, you find that the evidence is so uncertain or inadequate that you have to guess what the answer should be, then the party having the burden of proof as to that question has not met the required burden of proof. Your answers are not to be based on guesswork or speculation. They are to be based upon credible evidence from which you can find the existence of the facts that the party must prove in order to satisfy the burden of proof on the question under consideration. In determining whether any fact has been proved, you should consider all of the evidence bearing on the question regardless who introduced it.

Number of Witnesses

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a large number. You need not accept the testimony of the larger number of witnesses.

All Persons Equal Before the Law

This case should be considered and decided by you as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons stand equal before the law and are to be treated as equals.

Conviction of Crime

You have heard evidence that plaintiff Michael Kingsley has been convicted of a felony. You may use that evidence to help you decide whether plaintiff's testimony is truthful and how much weight to give his testimony. You may not consider this evidence for any other purpose.

Multiple Defendants

You must give separate consideration to each claim and each party in this case. Although there are two defendants, it does not follow that if one is liable, the other is also liable. In considering a claim against a defendant, you must not consider evidence admitted only against other defendants.

Special Verdict Questions

Plaintiff alleges that defendants used excessive force against him.

Question No. 1 asks whether on May 21, 2010, one or both defendants used excessive force against plaintiff.

Excessive force means force applied recklessly that is unreasonable in light of the facts and circumstances of the time. Thus, to succeed on his claim of excessive use of force, plaintiff must prove each of the following factors by a preponderance of the evidence:

(1) Defendants used force on plaintiff;

(2) Defendants' use of force was unreasonable in light of the facts and circumstances at the time;

(3) Defendants knew that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff's safety by failing to take reasonable measures to minimize the risk of harm to plaintiff; and

(4) Defendants' conduct caused some harm to plaintiff.

In deciding whether one or more defendants used "unreasonable" force against plaintiff, you must consider whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances that defendants faced. You must make this decision based on what defendants knew at the time of the incident, not based on what you know now.

Also, in deciding whether one or more defendants used unreasonable force and acted with reckless disregard of plaintiff's rights, you may consider such factors as:

- The need to use force;
- The relationship between the need to use force and the amount of force used;
- The extent of plaintiff's injury;
- Whether defendants reasonably believed there was a threat to the safety of staff or prisoners; and
- Any efforts made by defendants to limit the amount of force used.

A person can be harmed even if he did not suffer a severe injury.

You have heard evidence about whether the defendants' conduct complied with or violated their training and Monroe County Sheriff's Department policies. You may consider this evidence in your deliberations. But remember that the issue is whether the defendants used excessive force on plaintiff, not whether defendants complied with or violated their training or the Monroe County Sheriff's Department policies.

If you find that plaintiff has proved each element of his excessive force claim by a preponderance of the evidence with respect to one or both defendants, you should answer "Yes" in the appropriate space in Question No. 1. Then proceed to Question No. 2.

If, on the other hand, you find that plaintiff has failed to prove any element of his excessive force claim by a preponderance of the evidence with respect to one or both defendants, you should answer "No" in the appropriate space in Question No. 1. If you answer "No" as to both defendants in Question No. 1, you should not consider any more questions.

Damages Questions

Questions Numbers 2, 3 and 4 involve the issue of damages. If you answer "Yes" to Question No. 1 for one or both defendants, then you must answer Question No. 2 and Question No. 3 for those defendants.

Compensatory damages

Question No. 2 asks what amount of money, if any, will fully and fairly compensate plaintiff for the harm caused by defendants. These are called "compensatory damages."

Plaintiff has the burden of convincing you, by the preponderance of the evidence, both that he has been

injured or damaged and the amount of the damages. This does not mean, however, that plaintiff must produce evidence that is as exact as the evidence needed to support findings on other questions in the verdict. Determining damages involves the consideration of many different factors that cannot be measured precisely. In determining the damages you must base your answer on evidence that reasonably supports your determination of damages under all of the circumstances of the case.

Compensatory damages are not restricted to the actual loss of money; they include both the physical and mental aspects of injury, even if these are not easy to measure. You should consider the physical, mental and emotional pain and suffering that plaintiff has experienced.

Do not measure damages by what the lawyers ask for in their arguments. Their opinions as to what damages should be awarded should not influence you unless their opinions are supported by the evidence. It is your job to determine the amount of the damages sustained from the evidence you have seen and heard. Examine that evidence carefully and impartially. Do not add to the damage award or subtract anything from it because of sympathy to one side or because of hostility to one side. Do not make any deductions because of a doubt in your minds about the liability of any of the parties.

If you find in favor of plaintiff on Question No. 1 but find that he has failed to prove that he has suffered any compensatory damages, you should enter $1.00 in nominal damages for plaintiff in Question No. 2.

Punitive Damages

Question No. 3 **asks whether one or both defendants acted in a way that demonstrated a willful or reckless disregard for plaintiff's rights. If you answered "yes" to Question No. 3 with respect to one or both defendants, you may award punitive damages in *Question No. 4* against those defendants.**

Punitive damages are never a matter of right. This means that you are not required to make any award of punitive damages, but you may do so if you think it is proper under the circumstances. It is in the jury's discretion to award or withhold them.

Punitive damages may be awarded even if the violation of plaintiff's rights resulted in only nominal compensatory damages. That is, you may award punitive damages even if the plaintiff can show no damages or other injury as a result of defendants' actions.

The purposes of punitive damages are to punish the defendants for their conduct and to serve as an example or warning to the defendants and others not to engage in similar conduct in the future. Plaintiff must prove by a preponderance of the evidence that punitive damages should be assessed against defendants.

You may assess punitive damages only if you find that the conduct of at least one of the defendants was in reckless disregard of plaintiff's rights. An action is in reckless disregard of plaintiff's rights if under the circumstances, it reflects complete indifference to plaintiff's safety or rights. If you find that a defendant's conduct was motivated by evil motive or intent, such as ill will or spite or grudge either toward plaintiff individually or toward all

persons such as plaintiff, then you may find that the defendant deliberately violated the plaintiff's rights. In addition, if the defendant was in a position in which he certainly should have known that his conduct would violate the plaintiff's rights, and proceeded to act in disregard of that knowledge and of the harm or the risk of harm that would result to the plaintiff, then that defendant acted with reckless disregard for the plaintiff's rights.

If you find that punitive damages are appropriate, then you must use sound reason in setting the amount of those damages. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes that I have described to you, but should not reflect bias, prejudice, or sympathy toward any party. In determining the amount of any punitive damages, you should consider the following factors:

- the reprehensibility of defendants' conduct;
- the impact of defendants' conduct on plaintiff;
- the relationship between the plaintiff and defendants;
- the likelihood that defendants would repeat the conduct if an award of punitive damages is not made; and
- the relationship of any award of punitive damages to the amount of actual harm the plaintiff suffered.

Selection of Presiding Juror; Communication with the Judge; Verdict

When you go to the jury room to begin considering the evidence in this case you should first select one of the members of the jury to act as your presiding juror.

This person will help to guide your discussions in the jury room.

You are free to deliberate in any way you decide or select whomever you like as a presiding juror. When thinking about who should be presiding juror, you may want to consider the role that the presiding juror usually plays. He or she serves as the chairperson during the deliberations and has the responsibility of insuring that all jurors who desire to speak have a chance to do so before any vote. The presiding juror should guide the discussion and encourage all jurors to participate. I encourage you at all times to keep an open mind if you ever disagree or come to conclusions that are different from those of your fellow jurors. Listening carefully and thinking about the other juror's point of view may help you understand that juror's position better or give you a better way to explain why you think your position is correct.

Once you are in the jury room, if you need to communicate with me, the presiding juror will send a written message to me. However, don't tell me how you stand as to your verdict.

As I have mentioned before, the decision you reach must be unanimous; you must all agree.

When you have reached a decision, the presiding juror will sign the verdict form, put a date on it, and all of you will return with the verdict into the courtroom.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed: 10/18/12]

10-cv-832-bbc

MICHAEL B. KINGSLEY,

Plaintiff,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Defendants.

SPECIAL VERDICT

We, the jury, for our special verdict, find as follows:

Question No. 1: On May 21, 2010, did one or both of the defendants use excessive force against plaintiff Michael Kingsley?

Stan Hendrickson: NO
("Yes" or "No")

Fritz Degner: NO
("Yes" or "No")

If you answered "No" to Question No. 1 for both defendants, do not answer any more questions.

If you answered "Yes" to Question No. 1 for either defendant, answer Question No. 2.

Question No. 2: What amount of money, if any, will fully and fairly compensate plaintiff Michael Kingsley for the harm caused by defendants?

$_____

No matter how you answered Question No. 2, answer Question No. 3 as to each defendant for whom you answered "Yes" in Question No. 1.

Question No. 3: Did one or both of the defendants act in a way that demonstrated a willful or reckless disregard for plaintiff's rights?

Stan Hendrickson: _____

("Yes" or "No")

Fritz Degner: _____

("Yes" or "No")

If you answered "No" to Question No. 3 for both defendants, do not answer any more questions.

If you answered "Yes" to Question No. 3 for either defendant, answer Question No. 4 as to each defendant for whom you answered "Yes" in Question No. 3.

Question No. 4: What amount of money, if any, do you award as punitive damage's?

Stan Hendrickson: _____

("Yes" or "No")

Fritz Degner: _____

("Yes" or "No")

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/s/ Mark Rowley
Presiding Juror

Madison, Wisconsin

Date: 10-17-12

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed: 10/23/12]

10-cv-832-bbc

MICHAEL B. KINGSLEY,

Plaintiff,

v.

DENNIS PEDERSEN, LISA JOSVAI, PATRICIA FISH, ROBERT CONROY, STAN HENDRICKSON, FRITZ DEGNER AND KARL BLANTON,

Defendants.

JUDGMENT IN A CIVIL CASE

This action came before the court and a jury with District Judge Barbara B. Crabb presiding. The issues have been considered, tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendants and this case is dismissed.

Approved as to form this 18th day of October, 2012.

/s/ Barbara B. Crabb
Barbara B. Crabb,
District Judge

/s/ Peter Oppeneer
Peter Oppeneer, Clerk of Court

10/23/12
Date

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12-3639

MICHAEL B. KINGSLEY,

Plaintiff-Appellant,

v.

STAN HENDRICKSON, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 3:10-cv-00832-bbc
Barbara B. Crabb, Judge.

ARGUED APRIL 23, 2013
DECIDED MARCH 3, 2014

Before RIPPLE and HAMILTON, *Circuit Judges*, and STADTMUELLER, *District Judge*.*

RIPPLE, *Circuit Judge*. Michael Kingsley brought this action under 42 U.S.C. § 1983 against six staff members of a Wisconsin county jail, where he had been held as a pretrial detainee in 2010. Mr. Kingsley

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* The Honorable J.P. Stadtmueller, United States District Court for the Eastern District of Wisconsin, sitting by designation.

alleged that during his forcible transfer to a new cell, which included the application of a taser, the defendants had violated various of his constitutional and statutory rights. The district court granted partial summary judgment for the defendants; a single claim of excessive force against Sgt. Stan Hendrickson and Deputy Fritz Degner proceeded to trial. The jury returned a verdict for the defendants.

Mr. Kingsley now appeals the judgment entered on the verdict, contending that the jury received erroneous and confusing instructions. Specifically, Mr. Kingsley contends that the district court conflated the standards for excessive force under the Eighth and Fourteenth Amendments and, as a result, wrongly instructed the jury to consider the subjective intent of the defendants. Mr. Kingsley also contends that the instructions misstated the harm that he must prove to obtain relief. We hold that the instructions were not an erroneous or confusing statement of the law of this circuit and that Mr. Kingsley affirmatively acquiesced to the instruction dealing with harm. Accordingly, we affirm the judgment of the district court.

I

BACKGROUND

A.

In April 2010, Mr. Kingsley was booked into the Monroe County Jail in Sparta, Wisconsin, as a pretrial detainee. On May 1, he was transferred to the facility's south cell block.

On May 20, 2010, a deputy performing a cell check noticed a sheet of yellow legal paper covering the light above Mr. Kingsley's bed and ordered him to take it down. Mr. Kingsley refused the order and answered

that he had not put the paper there.[1] The deputy moved on. When he returned for a further cell check later in the evening, he noticed that the paper had not been removed and again ordered Mr. Kingsley to take it down. After another refusal and a warning of possible disciplinary action, the deputy issued him a minor violation and reported it to Sgt. Hendrickson. Sgt. Hendrickson informed Deputy Karl Blanton that Mr. Kingsley would have to remove the paper in the morning.

When Deputy Blanton made his morning rounds, he ordered Mr. Kingsley to take down the paper. Mr. Kingsley did not respond and did not remove the paper. A few minutes later, Sgt. Hendrickson came to deliver Mr. Kingsley's medication, and he again ordered Mr. Kingsley to take down the paper. After several requests, Mr. Kingsley again refused, stating once again that he had not put the paper there. Sgt. Hendrickson next called the jail administrator, Lieutenant Robert Conroy.

Lt. Conroy then went to Mr. Kingsley's cell. After Mr. Kingsley refused his order, Lt. Conroy said jail staff would take the paper down and would have to transfer Mr. Kingsley to another cell in the interim. He also threatened discipline.

A few minutes later, Sgt. Hendrickson, Deputy Blanton, Lt. Conroy, Deputy Fritz Degner and Deputy Sheriff Shisler arrived at the cell. They ordered Mr. Kingsley to stand up and to back up to the door with his hands behind his back. Mr. Kingsley asked why and protested that he had done nothing wrong. Deputy

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[1] Apparently, covering the lights with paper is a common practice by inmates in an effort to dim some of the brightness of the jail's lights.

Degner told Mr. Kingsley to follow the order or he would be tasered. He was again ordered to get up, but he continued to lie facedown on his bunk. He did, however, put his hands behind his back.

At this point, Sgt. Hendrickson and Deputy Blanton entered the cell, and, with some difficulty (which they attribute to Mr. Kingsley "tensing" his arms and holding them apart),[2] they were able to handcuff him. Mr. Kingsley would not follow an order to stand, so they pulled him to his feet. Mr. Kingsley then fell to his knees; he claimed that, in pulling him off of the bed, the officers had smacked his feet on the bedframe, causing him pain. He claimed that the pain was so severe that he could not stand or walk. The officer therefore carried him out of the cell by holding him under his arms and placed him facedown in the hallway. When he would not answer questions about his foot injury, he was taken in the same manner to a receiving cell and placed facedown on the bunk.

Once he was on the receiving-cell bunk, the officers attempted to remove the handcuffs. The evidence at trial was conflicting on the later course of events.[3] The defendants say that Mr. Kingsley resisted their effort, pulling the handcuffs apart and trying to get up. Mr. Kingsley denied this resistance at trial. At some point, Sgt. Hendrickson put his knee in Mr. Kingsley's back, and Mr. Kingsley told him, in colorful language, to get

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[2] R.27 at 7.

[3] The record contains several videos, including one of the transfer and one of the incident in the receiving cell. However, the district court found them of limited value on the disputed points because the camera angle is such that Mr. Kingsley is nearly entirely blocked by the defendants.

off him. Mr. Kingsley claims that the defendants then smashed his head into the concrete bunk, an allegation the defendants deny.

After some further verbal exchange,[4] Deputy Degner applied a taser for five seconds on Mr. Kingsley's back. Lt. Conroy then ordered all of the staff to clear the cell. Fifteen minutes later, the staff returned and were able to remove the handcuffs. Mr. Kingsley was placed on a medical watch, but refused the attention of a nurse.[5]

B.

In December 2010, Mr. Kingsley, proceeding pro se, brought this action in the district court. His principal theory was that the defendants had violated his due process rights under the Fourteenth Amendment.[6] His initial complaint presented several claims against seven Monroe County defendants, including an excessive force claim relating only to Sgt. Hendrickson and Deputy Degner.

The parties cross-moved for summary judgment. The district court granted partial judgment for the defendants on a procedural due process claim relating

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[4] Mr. Kingsley claims Sgt. Hendrickson ordered Deputy Degner to "[t]ase his ass." R.157 at 52. The defendants deny that these words were used but agree that Sgt. Hendrickson told Deputy Degner to apply the taser in contact stun mode to Mr. Kingsley.

[5] Following the incident, Mr. Kingsley was given a major violation report showing four rule violations. The events surrounding the issuance of that report and the consequences were a part of Mr. Kingsley's procedural due process claim, which is not at issue in this appeal.

[6] He brought the federal claims under 42 U.S.C. § 1983. A state law claim for assault and battery initially was presented as well. That claim is not at issue in this appeal.

to Mr. Kingsley's discipline by jail staff. It concluded, however, that material issues of fact remained that precluded judgment on the excessive force claim based on the officers' conduct in the receiving cell. Specifically, the court identified "a dispute about whether defendants slammed plaintiff's head into the concrete bed and used a taser against him solely for the purpose of causing him harm."[7] Although the officers clearly had difficulty removing the handcuffs, Mr. Kingsley claims that it was because they had been applied too tightly and Sgt. Hendrickson's kneeling on his back had caused his body to tense; the officers claim that Mr. Kingsley was resisting. The court observed that, from the video, "it is not clear . . . whether plaintiff was resisting or struggling. [He] does not appear to be moving his body around aggressively or very much at all."[8]

The court noted the case law that held that it was reasonable to use force against an inmate who refused to comply with orders but concluded that the issue in the case was "whether [the] defendants' response to plaintiff's obstinance was *reasonable under the circumstances* or whether it was excessive and was intended to cause [the] plaintiff harm."[9] The court also concluded that, because a jury could find that the defendants had acted with malice, qualified immunity was not available. Although the court, in its ruling, concluded that the relevant constitutional right was contained within the Fourteenth Amendment because of Mr. Kingsley's status as a pretrial detainee, the

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[7] R.69 at 12.

[8] *Id.* at 7.

[9] *Id.* at 14 (emphasis added).

court applied Eighth Amendment excessive force standards in assessing the claim.

Following the grant of summary judgment, the parties stipulated to the dismissal with prejudice of all outstanding claims except the excessive force claim against Sgt. Hendrickson and Deputy Degner. Counsel was appointed for Mr. Kingsley and the case proceeded to trial. In pretrial proceedings, the district court proposed an instruction on excessive force to which both parties objected, and the court made various modifications. At the close of the evidence, the parties revisited the instruction and again objected to its content. Again, the district court made some modification and added a clarifying instruction. The court finally settled on the following instruction:

> Excessive force means force applied recklessly that is unreasonable in light of the facts and circumstances of the time. Thus, to succeed on his claim of excessive use of force, plaintiff must prove each of the following factors by a preponderance of the evidence:
>
> (1) Defendants used force on plaintiff;
>
> (2) Defendants' use of force was unreasonable in light of the facts and circumstances at the time;
>
> (3) Defendants knew that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff's safety by failing to take reasonable measures to minimize the risk of harm to plaintiff; and
>
> (4) Defendants' conduct caused some harm to plaintiff.

> In deciding whether one or more defendants used "unreasonable" force against plaintiff, you must consider whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances that defendants faced. You must make this decision based on what defendants knew at the time of the incident, not based on what you know now.
>
> Also, in deciding whether one or more defendants used unreasonable force and acted with reckless disregard of plaintiff's rights, you may consider such factors as:
>
> • The need to use force;
>
> • The relationship between the need to use force and the amount of force used;
>
> • The extent of plaintiff's injury;
>
> • Whether defendants reasonably believed there was a threat to the safety of staff or prisoners; and
>
> • Any efforts made by defendants to limit the amount of force used.[10]

Mr. Kingsley's counsel objected to the inclusion of "harm" as an element of an excessive force claim. He contended that the jury might confuse the element of harm for some sort of lasting or significant injury. Counsel first requested a clarifying instruction that "pain is considered harm."[11] When the court began to offer a preferred alternative, "[A] person can be harmed even if he does not suffer a lasting injury or . . .," plaintiff's counsel interjected, "Or severe

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[10] R.146 at 3-4.

[11] R.156 at 79.

injury."[12] Following this exchange, the jury was instructed that "[a] person can be harmed even if he did not suffer a severe injury."[13]

The jury returned a verdict for the defendants, and the district court entered judgment dismissing the case. Mr. Kingsley timely appeals the judgment. He submits that the instruction misstated the law and confused the jury on the subjects of both the intent and harm necessary to establish an excessive force claim in the pretrial detainee context.

II

DISCUSSION

On appeal, Mr. Kingsley raises two challenges to the jury instructions. First, he claims that the instruction wrongfully conflated the standard for excessive force claims under the Eighth and Fourteenth Amendments and that, as a result, the instructions incorrectly required him to demonstrate that the defendants acted with reckless disregard for his safety. Second, Mr. Kingsley claims that the instruction regarding harm, which stated that harm was an element of the claim and that it could be demonstrated without a showing of "severe injury," was both incorrect and confusing.

We shall assess each of his objections to the instructions in turn. Our review of jury instructions is de novo. *Huff v. Sheahan*, 493 F.3d 893, 899 (7th Cir. 2007). We must "determine whether, taken as a whole, [the instructions] correctly and completely informed the jury of the applicable law." *Id.* "We defer to the district court's phrasing of an instruction that

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[12] *Id.* (internal quotation marks omitted).

[13] R.146 at 4.

accurately states the law; however, we shall reverse when the instructions misstate the law or fail to convey the relevant legal principles in full and when those shortcomings confuse or mislead the jury and prejudice the objecting litigant." *Id.* (citation omitted) (internal quotation marks omitted).

A.

1.

A claim of excessive force, like the one at issue here, is, at bottom, one that seeks to impose liability for "physically abusive governmental conduct." *Graham v. Connor*, 490 U.S. 386, 394 (1989). The right to be free from such abuse derives from various provisions of the Bill of Rights. The Fourth Amendment affords protection to the person in the context of a seizure, *id.*; the Eighth Amendment applies when, following the constitutional guarantees of our criminal process, there has been an adjudication of guilt and an imposition of sentence, *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977). Between the status of arrestee and sentenced prisoner is the intermediate status of the detainee, who similarly is entitled to protection from physically abusive government conduct. The constitutional source of that protection lies in the right to be free from deprivations of liberty without due process of law. *Bell v. Wolfish*, 441 U.S. 520, 535 & n.16 (1979).

In sum, we evaluate a claim of excessive force not under "some generalized 'excessive force' standard," but "by reference to the specific constitutional standard which governs that right." *Graham*, 490 U.S. at 394. Mr. Kingsley was a pretrial detainee at the time of the tasing incident; therefore, the Fourteenth Amendment's Due Process Clause is the source of his

substantive right and determines the applicable standards to evaluate his claim. *See Ingraham*, 430 U.S. at 672 n.40; *Forrest v. Prine*, 620 F.3d 739, 743-44 (7th Cir. 2010).

2.

In examining the contours of the right to be free from excessive force *as an element of due process, Bell v. Wolfish*, 441 U.S. 520 (1979), is our primary touchstone. There, the Supreme Court evaluated a claim regarding the conditions of confinement for pretrial detainees. "[U]nder the Due Process Clause, a detainee *may not be punished* prior to an adjudication of guilt in accordance with due process of law." *Id.* at 535 (emphasis added). As a consequence, "the proper inquiry" is whether the treatment of the detainee "amount[s] to punishment." *Id.* The Supreme Court markedly contrasted due process protections for detainees against the rights of sentenced inmates: "A sentenced inmate[] . . . *may be punished*, although that punishment may not be 'cruel and unusual' under the Eighth Amendment." *Id.* at 535 n.16 (emphasis added).

Our cases also have noted that the protection afforded by the Due Process Clause is broader than that afforded under the Eighth Amendment. *See Lewis v. Downey*, 581 F.3d 467, 474 (7th Cir. 2009) ("[T]he Due Process Clause, which prohibits all 'punishment,' affords broader protection than the Eighth Amendment's protection against only punishment that is 'cruel and unusual.'"); *id.* at 475 (noting that, in the excessive force context, "anything that would violate the Eighth Amendment would also violate the Fourteenth Amendment"); *cf. Forrest*, 620 F.3d at 743-44 (acknowledging that "[t]he Fourteenth Amendment right to due process provides at least as much, and

probably more, protection against punishment as does the Eighth Amendment's ban on cruel and unusual punishment"). Of course, "[n]ot every disability imposed during pretrial detention amounts to 'punishment' in the constitutional sense." *Bell*, 441 U.S. at 537.[14] We must ask whether a particular action was taken "for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Id.* at 538.[15]

Notably, the Due Process Clause provides its own limiting principle; the Clause protects against only abusive conduct that is more than negligence, *Daniels v. Williams*, 474 U.S. 327, 334 (1986), or even gross negligence, *Archie v. City of Racine*, 847 F.2d 1211, 1219 (7th Cir. 1988) (en banc). Indeed, we have said that the official conduct must be at least reckless. *See Archie*, 847 F.2d at 1219-20. Recklessness, which necessarily incorporates some measure of subjective intent, stands in contrast to the rule under the Fourth Amendment that focuses only on whether the government conduct was "*objectively* reasonable" in light of all of the facts and circumstances. *Graham*, 490 U.S. at 397 (emphasis added) (internal quotation

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[14] As we already have noted, *Bell v. Wolfish*, 441 U.S. 520 (1979), was a conditions of confinement case, not a case concerning excessive force, and the Supreme Court has not applied its rule directly in the excessive force context. However, in *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989), the Court noted that *Bell* made clear the right of a detainee to be free from excessive force under the Due Process Clause.

[15] The Supreme Court has noted, at least in the context of the Eighth Amendment, that "punishment" itself requires "'a deliberate act intended to chastise or deter.'" *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985)).

marks omitted); *see also Common v. City of Chicago*, 661 F.3d 940, 943 (7th Cir. 2011).

While these cases make clear the basic theoretical and doctrinal distinction among the constitutional standards governing the various categories of confinement, they do not provide a practical framework for distinguishing the obligations of those constrained by each of the constitutional provisions. Indeed, on more than one occasion, while noting the distinction between pretrial and posttrial incarceration, we have decided the case before us by employing the more familiar Eighth Amendment standard. *See, e.g., Rice ex rel. Rice v. Corr. Med. Servs.*, 675 F.3d 650, 664 (7th Cir. 2012) ("[C]ourts still look to Eighth Amendment case law in addressing the claims of pretrial detainees, given that the protections of the Fourteenth Amendment's due process clause are at least as broad as those that the Eighth Amendment affords to convicted prisoners, and the Supreme Court has not yet determined just how much additional protection the Fourteenth Amendment gives to pretrial detainees." (citations omitted)); *Forrest*, 620 F.3d at 744 (affirming summary judgment for the defendant officers where the plaintiff detainee had "not explained[] . . . how any protections guaranteed by the Fourteenth Amendment provide him with more protection than he would receive under traditional Eighth Amendment standards"); *Lewis*, 581 F.3d at 474 (reversing summary judgment for officer in Fourteenth Amendment case upon concluding that the plaintiff had raised a genuine issue of fact even when considered under the more stringent standard set by the Eighth Amendment).

Here, we also have no need to delineate, in any comprehensive fashion, the differences between the

rights of pretrial detainees and adjudicated criminals. Our task is less ambitious. We must determine the adequacy of an instruction given to a jury tasked with determining whether excessive force was employed against a pretrial detainee. We simply must determine whether the instruction at issue was sufficiently precise in its description of the due process right of a pretrial detainee to ensure that Mr. Kingsley's case was fairly presented to the jury.

Several of our cases have explored the problem of describing, in the due process context, the right of a detainee to be free from excessive force. In *Titran v. Ackman*, 893 F.2d 145 (7th Cir. 1990), we expressed concern about defining a detainee's due process right to be free from excessive force by use of highly subjective terms such as "grossly disproportionate" or "shocks the conscience." *Id.* at 147 (internal quotation marks omitted). We pointed out that, in the usual course of events, "the propriety of using force on a person in custody pending trial will track the Fourth Amendment: the court must ask whether the officials behaved in a reasonable way in light of the facts and circumstances confronting them." *Id.* This emphasis on the objective standard of a reasonable prison officer was written, of course, against the background of the amorphous "shocks the conscience" standard. *See id.* at 147-48. Notably, however, while giving us the objective criteria borrowed from the Fourth Amendment as a more concrete touchstone against which to measure the conduct of government officials, the court in *Titran* also pointedly remarked that, because "the Due Process Clause does not proscribe negligence or even gross negligence, the search for 'punishment' *cannot be wholly objective*." *Id.* at 147 (emphasis added).

Wilson v. Williams, 83 F.3d 870 (7th Cir. 1996), a case that came to us posttrial and that involved the correctness of the jury instructions, afforded us an occasion to focus more directly on the requisite intent for a due process violation based on excessive force. The jury was instructed that the plaintiff must establish that there was a "use of force that was clearly excessive to the need[,] . . . the excessiveness of which was . . . objectively unreasonable in light of the facts and circumstances at the time." *Id.* at 873. The jury was further instructed that the plaintiff must establish that the defendant "acted deliberately or with callous indifference, evidenced by an actual intent to violate plaintiff's constitutional rights or reckless disregard for his rights." *Id.*

In *Wilson*, the plaintiff had objected that the instruction wrongfully excluded the officer's subjective intent from the jury's consideration. We perceived no error in this regard. We stated that, where the issue of intent is contested, "a jury may properly rely on objective factors to arrive at their determination of that intent." *Id.* at 876. Notably, we also reaffirmed the pointed holdings of *Anderson v. Gutschenritter*, 836 F.2d 346, 349 (7th Cir. 1988), and *Shelby County Jail Inmates v. Westlake*, 798 F.2d 1085, 1094 (7th Cir. 1986), that a plaintiff must prove that the defendants "acted deliberately or with callous indifference, evidenced by an actual intent to violate [the plaintiff's] rights or reckless disregard for his rights." *Wilson*, 83 F.3d at 875 (internal quotation marks omitted).

Again in *Rice ex rel. Rice v. Correctional Medical Services*, 675 F.3d 650 (7th Cir. 2012), when we confronted a situation analogous in many relevant respects to the situation before us today (jail guards extricating a detainee from his cell), we wrote:

> Where, as here, force is employed in the course of resolving a disturbance, the pertinent inquiry is whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. Factors relevant to that inquiry include whether jail officials perceived a threat to their safety and the safety of other inmates, whether there was a genuine need for the application of force, whether the force used was commensurate with the need for force, the extent of any injury inflicted, and whatever efforts the officers made to temper the severity of the force they used. *See also Forrest v. Prine*, 620 F.3d 739, 744-45 (7th Cir. 2010); *Lewis v. Downey*, 581 F.3d 467, 475-77 (7th Cir. 2009).

Id. at 668 (additional citations omitted) (internal quotation marks omitted).

Our dissenting colleague believes that our cases have been ambiguous on the question of intent, but we see no serious ambiguity here. Our cases make clear that, although we employ the objective criteria of the Fourth Amendment as a touchstone by which to measure the gravity of the defendant officer's conduct, we also recognize, quite clearly, the need for a subjective inquiry into the defendant's state of mind in performing the activity under scrutiny. In determining whether the defendant officer had the requisite state of mind—at least recklessness—the same criteria used to measure the defendant's lack of care are a useful benchmark. This is because, as *Titran* intimated, the gravity of the offense and the requisite intent are closely linked. *Titran* is clear that the strength of this link under a particular set of facts may mean that the inference of intent is so strong that no further inquiry need be made. *See Titran*, 893 F.2d

at 148 ("If the officers intentionally restrained, jolted, and roughed up Titran without physical provocation from her, their behavior was unreasonable."). But when the inference is less strong, the cases do make clear that some examination of intent is appropriate, and that the distinction makes a mechanical application of Fourth Amendment objective standards impossible. *See id.* at 147 ("Subtle differences between Fourth and [Fourteenth] Amendment standards *are inevitable on account of this mental element.*" (emphasis added)).[16]

We think at this point it is useful to pause and be certain that we have not lost sight of the basic point of *Bell*. *Bell* teaches that the central inquiry relevant in a Fourteenth Amendment case brought by a pretrial detainee is whether the state *punished* him—as opposed to whether it had merely held him, restricted him, or applied a measure of force in a manner consistent with and expected of constitutional restraints on liberty prior to trial. *Bell* was, of course, a conditions of confinement case, *see supra* n.14, but it notes the necessity of determining from the facts whether there is an *intent* to punish.

Finally, we note that although *some* consideration of intent is embraced by our cases, it is limited in significant measure by the fact that it is discernable

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[16] The dissent also suggests that under *Daniels v. Williams*, 474 U.S. 327 (1986), the only "intent" requirement applicable in Fourteenth Amendment cases is the general requirement of intentional rather than negligent acts, necessary to impose liability for *any* alleged constitutional violation. The difficulty with this view is that *Titran v. Ackman*, 893 F.2d 145 (7th Cir. 1990), and other of our cases already have held that there is something unique about the Fourteenth Amendment that imposes a burden not imposed under the Fourth Amendment.

from objective considerations[17]. *See Wilson*, 83 F.3d at 876.

3.

With these principles in mind, we now turn to the jury instruction at issue in the case before us.

On the subject of excessive force, the jury was instructed as follows:

> Excessive force means force applied recklessly that is unreasonable in light of the facts and circumstances of the time. Thus, to succeed on his claim of excessive use of force, plaintiff must prove each of the following factors by a preponderance of the evidence:
>
> (1) Defendants used force on plaintiff;
>
> (2) Defendants' use of force was unreasonable in light of the facts and circumstances at the time;
>
> (3) Defendants knew that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff's safety by failing

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[17] We acknowledge and are grateful for the fine work of the Committee that developed this circuit's impressive Pattern Civil Jury Instructions. Nevertheless, while those instructions represent learned studies of the law of this circuit, they are persuasive only to the extent that they accurately restate the law of this circuit. *See United States v. Burke*, 781 F.2d 1234, 1239 n.2 (1985) ("Although the pattern instructions are suggestive rather than absolutely binding, a decision of this court is authoritative."). Moreover, it is not clear from the commentary to the Pattern Instruction that the issue we now confront was considered squarely. Notably, there is no mention of the above cases and the contrary language included within them.

to take reasonable measures to minimize the risk of harm to plaintiff; and

(4) Defendants' conduct caused some harm to plaintiff.

In deciding whether one or more defendants used "unreasonable" force against plaintiff, you must consider whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances that defendants faced. You must make this decision based on what defendants knew at the time of the incident, not based on what you know now.

Also, in deciding whether one or more defendants used unreasonable force and acted with reckless disregard of plaintiff's rights, you may consider such factors as:

- The need to use force;
- The relationship between the need to use force and the amount of force used;
- The extent of plaintiff's injury;
- Whether defendants reasonably believed there was a threat to the safety of staff or prisoners; and
- Any efforts made by defendants to limit the amount of force used.[18]

Mr. Kingsley argues that the instructions were erroneous and confusing because he was required to establish that the officers had acted with "reckless disregard" for his safety, when the instruction should

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[18] R.146 at 3-4

have allowed the jury to find the existence of punishment on the basis of wholly objective factors.

A faithful adherence to the case law that we have discussed precludes our accepting this contention. As we have noted earlier, our cases are clear that the existence of intent—at least recklessness—*is* a requirement in Fourteenth Amendment excessive force cases. The court's instruction reflected this requirement in our case law. The jury was told specifically that, in determining whether the intent element is satisfied, that is, whether the defendants "acted with reckless disregard of plaintiff's rights," it "may consider" a non-exhaustive list of five factors, drawn almost verbatim from *Wilson*. In short, the instruction required a level of intent at least equivalent to recklessness, measured largely by the objective factors that we already have identified.[19]

The jury was instructed adequately on the elements of Mr. Kingsley's Fourteenth Amendment cause of action.[20]

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[19] The dissent contends that "[t]he clearest thing about *Wilson* is that it reversed the use of the confusing amalgam of an instruction." Dissent at 31. In *Wilson*, this court approved an instruction that tracked very closely the language used in this case, and turned on "whether the prohibited punitive intent was present." *Wilson v. Williams*, 83 F.3d 870, 877 (7th Cir. 1996). It reversed only on another element, completely absent from our present instruction, of a "good faith" defense. *Id.*

[20] The dissent also contends that the instruction was confusing not only because it introduced the extraneous concept of intent, but also because it did so in three separate and quite different ways. *See* dissent at 35-36. We think this overstates the point and overly parses the instruction, which is not our settled approach on review of such matters. True enough, the instruction uses the term "reckless" three times, in three separate phrases. Its first use, that the "force [must have been] applied recklessly" merely

B.

Mr. Kingsley next submits that the district court erred in instructing the jury on the issue of harm. He contends that he should not have been required to demonstrate harm at all and, if harm is an element, that the use of a taser establishes the requisite injury as a matter of law. For this latter proposition, Mr. Kingsley relies on *Lewis v. Downey*, 581 F.3d 467, 475 (7th Cir. 2009), in which we held that use of a taser qualified as more than a de minimis application of force. In the alternative, he argues that, even if the harm instruction itself were proper, the jury should not have been further instructed that "[a] person can be harmed even if he did not suffer a severe injury."[21] In his view, this clarifying instruction only confused the matter by "allow[ing] the jury to consider whether the use of the taser on Mr. Kingsley met some threshold standard of injury to qualify as harm."[22] The defendants counter that the plaintiff waived any

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tracks the usage that the dissent essentially admits is legally proper; that is, it says that the force must be applied in a manner displaying more culpability than negligence (i.e., the taser did not go "off by accident," *id.* at 39). The evidence admittedly did not suggest that it had, but no reasonable juror would have been confused as to the meaning under the circumstances. The second usage is less clear, but the surrounding context cures any confusion. Although the jury is asked to determine if the defendants "recklessly disregarded plaintiff's safety" —a less than ideal phraseology it is then told precisely *how* to determine it, by whether they had "failed to take reasonable measures to minimize harm to the plaintiff." The final usage is part of the phrase which introduces the uncontroversial objective considerations.

[21] R.146 at 4.

[22] Appellant's Br. 20

objection and that, in any event, the instruction as given was not erroneous.

1.

We begin with the question of waiver. At trial, Mr. Kingsley did object to the inclusion of harm as an element of the excessive force claim. Our reading of the transcript makes clear, however, that his objection was that, because the defendants repeatedly had contended that there had been no *lasting* injury, the inclusion of the element of harm might be misread as requiring *more* than de minimis harm. Counsel for Mr. Kingsley therefore requested a clarifying instruction that "pain is considered harm."[23] The court simply stated, "I think I'll add 'a person can be harmed even if he does not suffer a lasting injury or . . . ."[24] At this point, plaintiff's counsel interjected, "Or severe injury."[25]

Although Mr. Kingsley objected to the inclusion of "harm" as an element, counsel described the objection as concern that the inclusion of "harm" might be construed erroneously by the jury to require some lasting injury. Notably, counsel stated: "[W]e submit that in the Seventh Circuit, *injury* isn't a required element of an excessive force claim. I think the use of harm *is an element*."[26] Counsel specifically further told the court that "[i]t's just the extent that [the defendants are] going to argue and there will be any suggestion to the jury that some form of lasting injury

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[23] R.156 at 79.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 78 (emphasis added).

is required under the law, *that's what we would have the objection to.*"[27]

We do not discern on the record any argument presented to the district court that harm itself is not an element of the cause of action or that tasing constitutes harm per se. Consequently, we must agree that Mr. Kingsley's current position on the question of harm itself, or harm per se, has been forfeited.

2.

We now turn to the question whether the district court's clarifying instruction introduced confusion by suggesting to the jury that some unspecified level of injury was required to establish harm. The transcript makes clear that, after voicing the objection to the inclusion of harm and stating that it was out of concern that the defendants would argue need for a lasting injury, counsel for Mr. Kingsley participated in the modification of the instruction and specifically suggested the inclusion of the "[o]r severe injury" language that ultimately was given by the district court to ameliorate the concerns raised in the prior objection. In short, the clarifying instruction was offered at Mr. Kingsley's request, and for the very purpose of minimizing any risk that the jury would construe harm as a significant injury. Mr. Kingsley's counsel actively participated with the district court in achieving an instruction that would be satisfactory in that regard and did not continue an objection to the language as presenting further difficulty or insist on a more specific instruction that any amount of pain qualified as harm. Accordingly, the current objection is waived.

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[27] *Id.* at 79 (emphasis added).

In any event, even if the merits of these objections were properly before us, we previously have approved an instruction in this context that included a requirement of "some harm." *See Wilson*, 83 F.3d at 876. Although it would not have been error for the district court to define injury in a taser case in terms of pain, *see Lewis*, 581 F.3d at 475; *see also Hudson v. McMillian*, 503 U.S. 1, 9-10 (1992), the instruction given by the district court adequately permitted counsel to argue that the pain inflicted fulfilled the injury requirement of the cause of action. Indeed, counsel so argued.

There was no reversible error with respect to the requirement of a showing of "harm" in this case.

Conclusion

Because the jury instructions were neither erroneous nor confusing statements of the law of this circuit, the judgment in favor of the defendants is affirmed.

AFFIRMED

HAMILTON, *Circuit Judge*, dissenting. I respectfully dissent. This case presents an important issue about the extent of a pretrial detainee's constitutional right to be free from punishment and excessive force. If a pretrial detainee can prove that a correctional officer used objectively unreasonable force against him, it should be self-evident that the detainee was "punished" without due process of law. In this case, however, the district court's jury instruction on excessive force added an unnecessary and confusing element of "reckless" conduct or purpose to the required elements of plaintiff's claim.

The Committee on Pattern Civil Jury Instructions of the Seventh Circuit considered this question in 2009. The committee wisely omitted such language of recklessness or purpose from its Pattern Instructions 7.08 and 7.09 for excessive force claims by pretrial detainees. We should remand for a new trial with instructions tracking those pattern instructions. That way we could avoid the puzzle posed by the majority opinion: When does the Constitution allow law enforcement and correctional officers to use objectively unreasonable force against a person not convicted of a crime?

I. The Problem: Excessive Force Claims by Pretrial Detainees

As the majority explains, when law enforcement officers apply physical force to suspects, detainees, or prisoners, the constitutional standard depends on the status of the person on the receiving end. A person who is not in custody and who is a target of police force, such as in an arrest or investigative stop, is protected by the Fourth Amendment's prohibition on unreasonable seizures of the person. The Fourth Amendment standard is objective: was the application of force unreasonable in light of all the relevant circumstances confronting the officer at the time? *Graham v. Connor*, 490 U.S. 386, 395-97 (1989); Federal Civil Jury Instructions of the Seventh Circuit No. 7.08 & 7.09. On the question of liability for a Fourth Amendment violation, the officer's subjective purposes do not matter as long as the force was used intentionally rather than by accident. *Graham*, 490 U.S. at 397-99.

A person convicted of a crime and serving a custodial sentence is protected by the Eighth Amendment's prohibition on cruel and unusual punishment. The

Eighth Amendment standard differs from the Fourth because the officer's state of mind is critical. The plaintiff must prove that the correctional officer intentionally used extreme or excessive cruelty toward the plaintiff for the purpose of harming him, and not in a good faith effort to maintain or restore security or discipline. *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986); Federal Civil Jury Instructions of the Seventh Circuit No. 7.15. In *Graham*, the Supreme Court explained that the less protective Eighth Amendment standard applies "only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." 490 U.S. at 398-99, quoting *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977).

Both the objective standard under the Fourth Amendment for free citizens and the subjective standard under the Eighth Amendment for sentenced prisoners are well established in the law. The person in between is the pretrial detainee. That person is protected from excessive force by the Due Process Clauses of the Fifth or Fourteenth Amendments because he may not be "punished" until he has been adjudged guilty through due process of law. *Bell v. Wolfish*, 441 U.S. 520, 535 & n. 16 (1979); *Ingraham*, 430 U.S. at 671 n. 40. We have recognized that pretrial detainees receive more protection than convicted prisoners. *E.g.*, *Lewis v. Downey*, 581 F.3d 467, 474 (7th Cir. 2009).

Just what the excessive force standard for a pretrial detainee looks like in detail is not as clear. The detainee may often be held in a jail with convicted offenders under conditions that seem indistinguishable from prison, yet he has not been convicted and is still entitled to a presumption of

innocence. The Supreme Court has not settled the question of the standard for pretrial detainees. *Graham* explicitly left it open. 490 U.S. at 395 n.10. Our circuit's case law points in the direction of a standard identical or close to the objective Fourth Amendment standard, but there are conflicting signals in our opinions that we should clarify here.[1]

My colleagues rely heavily on *Wilson v. Williams*, 83 F.3d 870 (7th Cir. 1996), where a pretrial detainee claimed that he had been punished by the use of excessive force, but its guidance does not support the majority here. In *Wilson* we approved the portion of a jury instruction that tracked the objective Fourth Amendment standard. *Id.* at 876 ("While this sentence, lifted verbatim from *Graham*. . . was intended to apply to excessive force claims raised explicitly under the Fourth Amendment, we do not

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[1] There is a long-standing circuit split on the substantive standard for these excessive force claims by pretrial detainees. Compare, e.g., *Gibson v. County of Washoe*, 290 F.3d 1175, 1197 (9th Cir. 2002) (applying objective Fourth Amendment standard); and *Pierce v. Multnomah County*, 76 F.3d 1032, 1042-43 (9th Cir. 1996) (reversing defense verdict and ordering new trial with jury instructions using objective Fourth Amendment standard); with *Bozeman v. Orum*, 422 F.3d 1265, 1271 (11th Cir. 2005) (applying Eighth Amendment standard); and *Fuentes v. Wagner*, 206 F.3d 335, 346-48 (3d Cir. 2000) (applying Eighth Amendment standard to use of force to quell jail disturbance); see generally Karen M. Blum & John J. Ryan, *Recent Developments in the Use of Excessive Force by Law Enforcement*, 24 Touro L. Rev. 569, 573 (2008) (standards "vary widely"); Baker, *Wilson v. Spain: Will Pretrial Detainees Escape the Constitutional "Twilight Zone"?*, 75 St. John's L. Rev. 449 (2001). Because of the effect of qualified immunity in litigation of these claims, I respectfully submit that our court and/or the Supreme Court needs to bring greater clarity to this question for the sake of both detainees and law enforcement and correctional personnel.

consider it, nor the test which it espouses, inappropriate in the context here."). In other respects, though, the instruction given in *Wilson* was a confusing amalgam of Fourth Amendment, Eighth Amendment, and punitive damages law, along with a defense of subjective good faith that we said was erroneous. See *id.* at 877. We also noted that convicted prisoners and pretrial detainees are often held together in the same facility, so it might be impractical to have different standards, at least in the context of a jail disturbance. *Id.* at 876.

On this last point, though, recall the caution in *Bell* and *Graham* that the Eighth Amendment standard applies only after the state has complied with the constitutional protections needed to convict a person of crime. 441 U.S. at 535; 490 U.S. at 398-99. In light of *Bell* and *Graham* and their constitutional foundations, there is no apparent reason why a state's unilateral decision to house pretrial detainees with convicted prisoners—for financial or other institutional reasons—should have the effect of reducing the constitutional protections of pretrial detainees who are still presumed innocent. The clearest thing about *Wilson* is that it reversed the use of the confusing amalgam of an instruction. It does not support the recklessness instruction given here.

More enlightening is *Titran v. Ackman*, 893 F.2d 145 (7th Cir. 1990), where a pretrial detainee brought a claim for excessive force. We applied the objective reasonableness standard identical to the Fourth Amendment: "It does not follow [from the transition from arrest to detention] that officers acquired greater ability to assault and batter Titran." *Id.* at 147. We explicitly rejected one defendant's effort to apply a subjective standard, and we noted: "Multiple

standards of official conduct send confusing signals that undermine the force of the law. . . ." *Id.* Our holding was clear: "If the officers intentionally restrained, jolted, and roughed up Titran without physical provocation from her, their behavior was unreasonable." *Id.* at 148. That looks like an objective standard.

My colleagues make much of a sentence in *Titran* between the two I have quoted: "Given *Daniels v. Williams* and *Archie v. City of Racine*, holding that the Due Process Clause does not proscribe negligence or even gross negligence, the search for 'punishment' cannot be wholly objective." Id. at 147 (citations omitted). As explained below, however, the point of *Williams* and *Archie* is only that the officer's conduct must be intentional. Negligent accidents do not violate the Constitution. Neither decision added a subjective element of wrongful purpose into the excessive force standard for a pretrial detainee, nor did *Titran* do so. Nevertheless, I will cheerfully acknowledge that our few opinions on excessive force against pretrial detainees leave some room for debate. This case provides an opportunity to clarify the standard, but we are missing that opportunity.

II. The Pattern Jury Instructions

The Committee on Pattern Civil Jury Instructions of the Seventh Circuit took up this problem in 2009 and published with approval of the Circuit Council the pattern jury instructions that advise using the same objective reasonableness standards for excessive force claims by pretrial detainees as well as arrestees. The Circuit Council's publication does not imply substantive approval for every line of the instructions, but the committee chaired by Judge Robert H. Miller, Jr., included talented judges and practitioners

representing a range of perspectives, and the committee invited and received public comment on its draft instructions. The committee's work deserves our respect and close attention.

Pattern Instructions 7.08 and 7.09 were drafted for use in excessive force cases for both arrestees under the Fourth Amendment and pretrial detainees under the Fifth and Fourteenth Amendments. The full texts of the instructions and committee comments are attached as an appendix to this opinion.

The elements instruction, 7.08, includes three elements:

> 1. Defendant used unreasonable force against Plaintiff;
>
> [2. Because of Defendant's unreasonable force, Plaintiff was harmed;]
>
> [3. Defendant acted under color of law.]
>
> The second and third elements are in brackets because there will often be no dispute about them and because it is not clear whether "harm" is a distinct element, as the committee's comment explains.

Instruction 7.09 then explains what is meant by excessive or unreasonable force, and it does so in purely objective terms:

> You must decide whether Defendant's use of force was unreasonable from the perspective of a reasonable officer facing the same circumstances that Defendant faced. You must make this decision based on what the officer knew at the time of the arrest, not based on what you know now. In deciding whether Defendant's use of force

> was unreasonable, you must not consider whether Defendant's intentions were good or bad.
>
> In performing his job, an officer can use force that is reasonably necessary under the circumstances.

The committee chose not to identify specific factors, but offered a proposed list for judges who believe such a list might aid a jury:

> — the need for the use of force;
>
> — the relationship between the need for the use of force and the amount of force used;
>
> — the extent of the plaintiff's injury;
>
> — any efforts made by the defendant to temper or limit the amount of force;
>
> — the severity of the crime at issue;
>
> — the threat reasonably perceived by the officer(s);
>
> — whether the plaintiff was actively resisting arrest or was attempting to evade arrest by fleeing.

These pattern instructions are more consistent with the applicable constitutional standard, see *Graham*, *Titran*, and *Wilson*, and much less confusing than the instruction used in this case. The problem is the concept of "recklessness" in the district court's instruction.

III. The Instruction Given in This Trial

The jury instruction given in plaintiff Kingsley's trial, quoted by the majority at pages 8-9, goes astray by introducing the concept of reckless conduct as an additional element the plaintiff must prove. The first line of the instruction given in this trial told the jury

that excessive force is "force applied *recklessly* that is unreasonable in light of the facts and circumstances of the time." In the Fourth Amendment context, excessive force is force that is unreasonable in light of the facts and circumstances the officer faced. *Graham*, 490 U.S. at 396-97; *Fitzgerald v. Santoro*, 707 F.3d 725, 733 (7th Cir. 2013); *Phillips v. Community Ins. Corp.*, 678 F.3d 513, 519 (7th Cir. 2012).

Assuming the pretrial detainee plaintiff can prove force "that is unreasonable in light of the facts and circumstances of the time," which is the correct standard, the concept "recklessly" adds a vague and confusing extra hurdle for the plaintiff. Put another way, how and why would it be constitutional for an officer to use force against a pretrial detainee that was "unreasonable in light of the facts and circumstances of the time," since this instruction invites that very possibility? How and why would objectively unreasonable force be deemed anything other than "punishment" that would be imposed on the detainee without due process of law? See *Bell*, 441 U.S. at 535 ("under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.").

The instruction here also introduced a second version of recklessness in the third element, saying the plaintiff must show: "Defendants knew that using force presented a risk of harm to plaintiff, but they *recklessly disregarded plaintiff's safety* by failing to take reasonable measures to minimize the risk of harm to plaintiff." I am not at all sure what that means, and I don't know how a juror should have interpreted it. Must the plaintiff come forward with evidence of reasonable measures that would have minimized the risk of harm? Would simply refraining

from the alleged use of force—in this case, using a taser on an allegedly compliant prisoner, or refraining from smashing his head into a concrete bed—have been sufficient? Or was something else required? (I realize that whether the plaintiff was actually compliant by that time and how force was used were hotly debated at trial, but jury instructions must guide the jury on the law applicable to both sides' versions of the facts.)

Adding to the confusion, the same jury instruction then used a third version of recklessness, telling the jury: "in deciding whether one or more defendants used unreasonable force and acted with *reckless disregard of plaintiffs rights*, you may consider such factors as. . . ." A juror trying to follow the instructions carefully might ask at this point where the idea of reckless disregard of plaintiff's rights came from and what it means. Something different from use of excessive force? Something different from the first two uses of recklessness? Does this instruction mean the defendant must have realized he was violating the detainee's rights, or at least not cared whether he was doing so? Reckless disregard for the plaintiff's rights will support a punitive damage award, so that admittedly subjective concept is used in punitive damage instructions. See *Smith v. Wade*, 461 U.S. 30, 56 (1983); Pattern Inst. No. 7.24. But reckless disregard of the plaintiff's rights is simply not an element of the plaintiff's core case for liability. It was an error to add it to the elements instruction.

So the district court's instruction was erroneous for two reasons. First, it introduced an extra element—recklessness—that is simply not required in a pretrial detainee's claim for excessive force. Second, its treatment of that extra element in three different

ways made this instruction a confusing amalgam that a jury could not reasonably be expected to follow.

As we consider the district court's instruction, we should also step back a moment from the details of the case law and ask whether and why a pretrial detainee's claim for excessive force should differ at all from that of a person being arrested or stopped. The pretrial detainee is still cloaked in the presumption of innocence and may not be punished. *Bell*, 441 U.S. at 535; see also *Graham*, 490 U.S. at 398-99. Ordinarily, of course, a judge will have found probable cause to detain the person. If the detention is prolonged, a judge in the federal system ordinarily will have found either a risk of flight or a danger to the community. See 18 U.S.C. §3142(e).

Even those federal detainees are still presumed innocent, though, and should not be subject to punishment before a conviction. And in many state justice systems, a pretrial detainee may remain in jail for weeks or even months simply because he cannot afford the premium for the presumptive bond set in his case. For those many thousands of people in the criminal justice system, we should recognize that the intentional use of objectively unreasonable force against them amounts to punishment without due process of law and violates the Constitution. They are not and should not be required to prove more in terms of reckless disregard for or intentional violation of their rights. The transition from arrest to pretrial detention does not give officers "greater ability to assault and batter" the detainees. *Titran*, 893 F.2d at 147.

IV. The Role of Intentional or Reckless Conduct

To support the subjective recklessness element in the district court's instruction, my colleagues cite the case law holding that a plaintiff suing under 42 U.S.C. § 1983 for a constitutional violation must show intentional conduct. They then treat reckless conduct as a form of intentional conduct. See above at 13, citing *Daniels v. Williams*, 474 U.S. 327, 334 (1986), and *Archie v. City of Racine*, 847 F.2d 1211, 1219 (7th Cir. 1988) (en banc). That reasoning mistakenly combines two separate issues. The same confusion appeared in *Shelby County Jail Inmates v. Westlake*, 798 F.2d 1085, 1094 (7th Cir. 1986), and was repeated in *Anderson v. Gutschenritter*, 836 F.2d 346, 349 (7th Cir. 1988), both also cited by the majority. The Pattern Instruction Committee carefully and correctly kept the two issues separate.

In *Daniels* the Supreme Court resolved a circuit split on whether negligent conduct can violate the individual rights guaranteed by the Constitution. The Court's answer was no. In *Daniels* a jail inmate claimed he had been deprived of liberty when he was injured by slipping on a pillow that an employee had negligently left on a staircase. The Court left such claims from accidental conduct to state tort law. 474 U.S. at 332. At the same time, the Court carefully drew the distinction that my colleagues overlook. In response to an argument that prison officials' negligent failure to comply with procedural requirements in depriving a prisoner of good-time credit should be actionable, the Court explained: "We think the relevant action of the prison officials in that situation is their deliberate decision to deprive the inmate of good-time credit, not their hypothetically negligent failure to accord him the procedural

protections of the Due Process Clause." *Id.* at 333-34. Applying the same distinction here, the focus should be on a deliberate decision to use force, not a negligent or reckless or intentional failure to comply with the constitutional standard for using force.

In the context of an excessive force claim, *Daniels* means that if, during the removal of Kingsley from his cell, the application of force was not intentional— the taser went off by accident, for example, or a guard slipped, fell, and knocked the handcuffed inmate down so that his head hit the floor—then there would have been no constitutional violation. Reckless conduct is generally recognized as equivalent to intentional conduct for these purposes, when it is equivalent to criminal recklessness, meaning that the actor is subjectively aware of the high risk of harm and then disregards it. See *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Slade v. Board of School Directors of City of Milwaukee*, 702 F.3d 1027, 1029 (7th Cir. 2012); see also *Archie*, 847 F.2d at 1219.

In an appropriate case, therefore, it could be appropriate to instruct a jury that if the defendant's use of force was reckless (perhaps, for example, running through a crowd with a finger on the trigger of an unaimed gun), that would be sufficient to show intentional use of force. That would be an appropriate role for the concept of recklessness in an excessive force case. But there is no need for such an instruction unless the defense contends the use of force was unintended. The defense did not argue that here, so there was no need for a subjective element in the instruction.[2]

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[2] Section 1983 and *Bivens* excessive force cases in which defendants contend the application of force was accidental appear

My colleagues' reliance on the need for intentional conduct to justify the subjective recklessness elements of the instruction given here also proves too much. As explained above, intentional conduct is needed to show *any* constitutional violation, including the Fourth Amendment, where the standard for excessive force is objective. See *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) ("liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process"), citing *Daniels*, 474 U.S. at 328; *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989) ("seizure" requires "intentional acquisition of physical control" through "means intentionally applied"). That is why an accidental police shooting is not actionable under the Fourth Amendment, see *Watson v. Bryant*, 532 Fed. Appx. 453, 457 (5th Cir. 2013); *Pleasant v. Zamieski*, 895 F.2d 272, 276-77 (6th Cir. 1990); *Dodd v. City of Norwich*, 827 F.2d 1, 7-8 (2d Cir. 1987) (on reargument), but an *intentional* shot that accidentally hits the wrong person is a seizure of that person that may be actionable under the Fourth Amendment, *Fisher v. City of Memphis*, 234 F.3d 312, 317-18 (6th Cir. 2000).

The court in *Fisher* explained precisely the difference that my colleagues' reasoning overlooks. After recognizing that a Fourth Amendment violation requires intent, not negligence, the Sixth Circuit explained: "However, the intent in question is the intent to commit the act, not the intent that a certain result be achieved. Therefore, Officer Taylor's act of

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to be relatively unusual, but they do arise. The Pattern Instruction Committee allowed for them. Its comment on Instruction 7.08 advises judges in such cases to break the first element of unreasonable force into two parts: intentional use of force and unreasonable use of force.

firing the gun was intentional, even if the result was not one he sought to achieve. Instructing the jury that more than negligence was required would likely confuse the jury as to the intent question." *Id.* at 317. Again, because the defendants at this trial did not claim the use of force was accidental, there was no reason to introduce the concept of recklessness into the excessive force instruction.

Before closing, I should add that I have considerable sympathy for both this district judge and any other judge trying to distill our case law into a coherent elements instruction for a pretrial detainee's excessive force claim. Some of the cases cited by the majority—especially *Wilson*—reflect similar confusion. But that is why the work of the Pattern Instruction Committee was so valuable. We should endorse their work, not reject it.

Finally, I agree with the majority that plaintiff Kingsley waived in the district court his challenge to the "harm" element of the court's instruction on excessive force. As for the merits of that challenge, which the majority also addresses, I see no prejudicial error by including harm as an element. The Pattern Instruction Committee also confronted this issue as part of its Instruction 7.08 and could not come to a definitive conclusion. The committee's comment gives good advice and leaves the choice to the sound judgment of the district court. In most excessive force cases, harm is likely to be so obvious that it does not require treatment as a separate element. (It will ordinarily be relevant in deciding whether the force applied was excessive or in deciding on an amount of damages.) If the defense argues that the force used was too minimal to violate the plaintiff's rights, the plaintiff should not be prejudiced if the district judge

includes harm as an element but also instructs the jury, as the court did here, that pain can be harm for purposes of proving that element.

For these reasons, I would reverse the judgment of the district court and remand for a new trial with jury instructions that track Seventh Circuit Pattern Jury Instructions 7.08 and 7.09.

APPENDIX

7.08 FOURTH AMENDMENT/FOURTEENTH AMENDMENT: EXCESSIVE FORCE AGAINST ARRESTEE OR PRETRIAL DETAINEE — ELEMENTS

In this case, Plaintiff claims that Defendant used excessive force against him. To succeed on this claim, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Defendant used unreasonable force against Plaintiff;

[2 Because of Defendant's unreasonable force, Plaintiff was harmed;]

[3 Defendant acted under color of law.]

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff did not prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

Committee Comments

a. Unreasonable Force: For authority regarding the "unreasonable force" element of the claim, see *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985); *Deering v. Reich*, 183 F.3d 645 (7th Cir. 1999). Although *Graham* and *Garner* are Fourth Amendment cases involving arrestees, *Wilson v. Williams*, 83 F.3d 870, 876 (7th Cir. 1996), states that the same standard applies to pretrial detainees. A separate instruction applies to cases involving convicted prisoners.

If the defendant contends that the application of force was accidental, the court may wish to break the first element into two:

1. Defendant intentionally used force against Plaintiff;

2. The force Defendant used was unreasonable;

b. Harm to Plaintiff: Although some other circuits include an element of "damage" in their pattern instruction, *see, e.g.*, EIGHTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 4.30 (1999), the Committee believes that there is significant doubt as to whether damage, or "harm" as that term is commonly understood, is actually required for a finding of liability under §1983. Though "harm" in the commonly-understood sense is likely to exist in most excessive force cases, some cases will arise in which it does not, *e.g.*, a situation in which an officer strikes the plaintiff with his hand but leaves no mark and causes no lingering injury or pain. In such cases, the court will need to determine whether the jury should be instructed on this point.

In *Gumz v. Morrissette*, 772 F.2d 1395, 1400 (7th Cir. 1985), the court held that an officer's use of force was unconstitutional if it (1) caused severe injuries; (2) was grossly disproportionate to the need for action under the circumstances; and (3) was inspired by malice or shocked the conscience. *Gumz*, however, was overruled by *Lester v. City of Chicago*, 830 F.2d 706 (7th Cir. 1987), which used the same "totality of the circumstances test" that was later adopted by the Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989). In *Lanigan v. Village of East Hazel Crest, Illinois*, 110 F.3d 467 (7th Cir. 1997), the court upheld a claim based on force consisting of "one violent push and poke," noting that the plaintiff "need not have been injured to have an excessive force claim." *Id.* at 470 n.3. In *McNair v. Coffey*, 279 F.3d 463 (7th Cir. 2002), the court addressed a claim arising from an incident in which no physical force was used, but officers pointed their weapons at the plaintiffs. Though it determined that the officers were entitled to qualified immunity, and indicated that the Fourth Amendment appeared to require *some* use of force, *id.* at 467, the majority ended its opinion with the statement "we do not foreclose the possibility that the circumstances of an arrest could become 'unreasonable' without the application of physical force." *Id.* at 468. *See also Herzog v. Village of Winnetka, Ill.*, 309 F.3d 1041, 1043 (7th Cir. 2002) (refusal to loosen chafing handcuffs or shoving an arrestee would constitute actionable excessive force).

Even if, as *McNair* indicates, an application of force is required in order to implicate the Fourth Amendment, it is not at all clear that the plaintiff must suffer "harm" in order to obtain a finding of liability; the availability of nominal damages in excessive force cases suggests that "harm" is not a

requirement. *See, e.g., Briggs v. Marshall*, 93 F.3d 355, 360 (7th Cir. 1996) (indicating that nominal damages may be awarded in a Fourth Amendment excessive force case where no injury resulted from the use of excessive force, where the evidence of actual injury is not credible, or where the injury has no monetary value). Because the issue of whether a plaintiff must prove "harm" is not definitively resolved, the Committee placed the second element in brackets, indicating that a court should give this part of the instruction to the jury at its discretion.

c. Third element: The third element should be eliminated if the "color of law" issue is not in dispute.

d. Single Element Instruction: If the second and third elements are eliminated, only one element will remain, and the instruction's second sentence should read as follows: "To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that Defendant used unreasonable force against him."

7.09 FOURTH AMENDMENT/FOURTEENTH AMENDMENT: EXCESSIVE FORCE—DEFINITION OF "UNREASONABLE"

You must decide whether Defendant's use of force was unreasonable from the perspective of a reasonable officer facing the same circumstances that Defendant faced. You must make this decision based on what the officer knew at the time of the arrest, not based on what you know now. In deciding whether Defendant's use of force was unreasonable, you must not consider whether Defendant's intentions were good or bad.

In performing his job, an officer can use force that is reasonably necessary under the circumstances.

[An officer may use deadly force when a reasonable officer, under the same circumstances, would believe that the suspect's actions placed him or others in the immediate vicinity in imminent danger of death or serious bodily harm. [It is not necessary that this danger actually existed.] [An officer is not required to use all practical alternatives to avoid a situation where deadly force is justified.]]

Committee Comments

a. Authority: *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985); Deering v. Reich, 183 F.3d 645 (7th Cir. 1999).

b. Factors: Case law establishes a number of factors that may be relevant to the jury's determination of whether a particular use of force was unreasonable. The Committee did not list these factors in the instruction because the jury is to consider *all* circumstances, and the listing of some might suggest that others are irrelevant. However, a court may wish to consider giving a list of factors for the jury's consideration, and if it elects to do so the following is proposed:

— the need for the use of force;

— the relationship between the need for the use of force and the amount of force used;

— the extent of the plaintiff's injury;

— any efforts made by the defendant to temper or limit the amount of force;

— the severity of the crime at issue;

— the threat reasonably perceived by the officer(s);

— whether the plaintiff was actively resisting arrest or was attempting to evade arrest by fleeing.

See Graham v. Connor, 490 U.S. at 396 (fifth, sixth, and seventh factors). In *Wilson v. Williams*, 83 F.3d 870 (7th Cir. 1996), a Fourteenth Amendment excessive force case involving a pretrial detainee, the Seventh Circuit listed factors one, two, three, four, and six from the above list, and stated that they are "generally relied on in the Fourth Amendment excessive force context." *Id.* at 876. For this proposition, however, the court cited *Hudson v. McMillian*, 503 U.S. 1, 7 (1992), which was an Eighth Amendment case, not a Fourth Amendment case. *See generally* Eighth Circuit Manual of Model Jury Instructions (Civil) 4.10 (1999) (using factors one, two, and three).

c. Deadly Force: The final (bracketed) paragraph applies only in cases involving an officer's use of deadly force. *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985); *Sherrod v. Berry*, 856 F.2d 802, 805 (7th Cir. 1988). With regard to the final (bracketed) sentence of this paragraph, *see Deering v. Reich*, 183 F.3d 645, 652-653 (7th Cir. 1999); *Plakas v. Drinski*, 19 F.3d 1143, 1148 (7th Cir. 1994). The fact that a particularized instruction is proposed for deadly force cases does not preclude the consideration or giving of a particularized instruction in other types of cases, for example, those involving a fleeing felon or an officer's claim of self-defense.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12-3639

MICHAEL B. KINGSLEY,

Plaintiff-Appellant,

v.

STAN HENDRICKSON, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 3:10-cv-00832-bbc
Barbara B. Crabb, Judge.

MARCH 3, 2014

FINAL JUDGMENT

Before: KENNETH F. RIPPLE and DAVID F. HAMILTON, Circuit Judges, and J.P. STADTMUELLER, District Court Judge.*

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* The Honorable J.P. Stadtmueller, United States District Court for the Eastern District of Wisconsin, sitting by designation.

The judgment of the District Court is AFFIRMED in accordance with the decision of this court entered on this date.

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APRIL 18, 2014

ORDER

Before: KENNETH F. RIPPLE and DAVID F. HAMILTON, Circuit Judges, and J.P. STADTMUELLER, District Judge.*

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* The Honorable J.P. Stadtmueller, United States District Court for the Eastern District of Wisconsin, sitting by designation.

Upon consideration of Plaintiff-Appellant's petition for rehearing with suggestion of rehearing en banc, filed on March 17, 2014, no judge in active service has requested a vote thereon.** A majority of the judges on the original panel have voted to deny the petition. Judge Hamilton voted to grant panel rehearing.

IT IS ORDERED that the petition for rehearing with suggestion of rehearing en banc is hereby DENIED.

** Circuit Judge Flaum took no part in the consideration or the decision of this case.